

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

186 D

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20247
697

EDITH S. MARKUS,

Appellant,

v.

PENN MUTUAL LIFE INSURANCE CO.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 25 1966

Nathan J. Paulson
CLERK

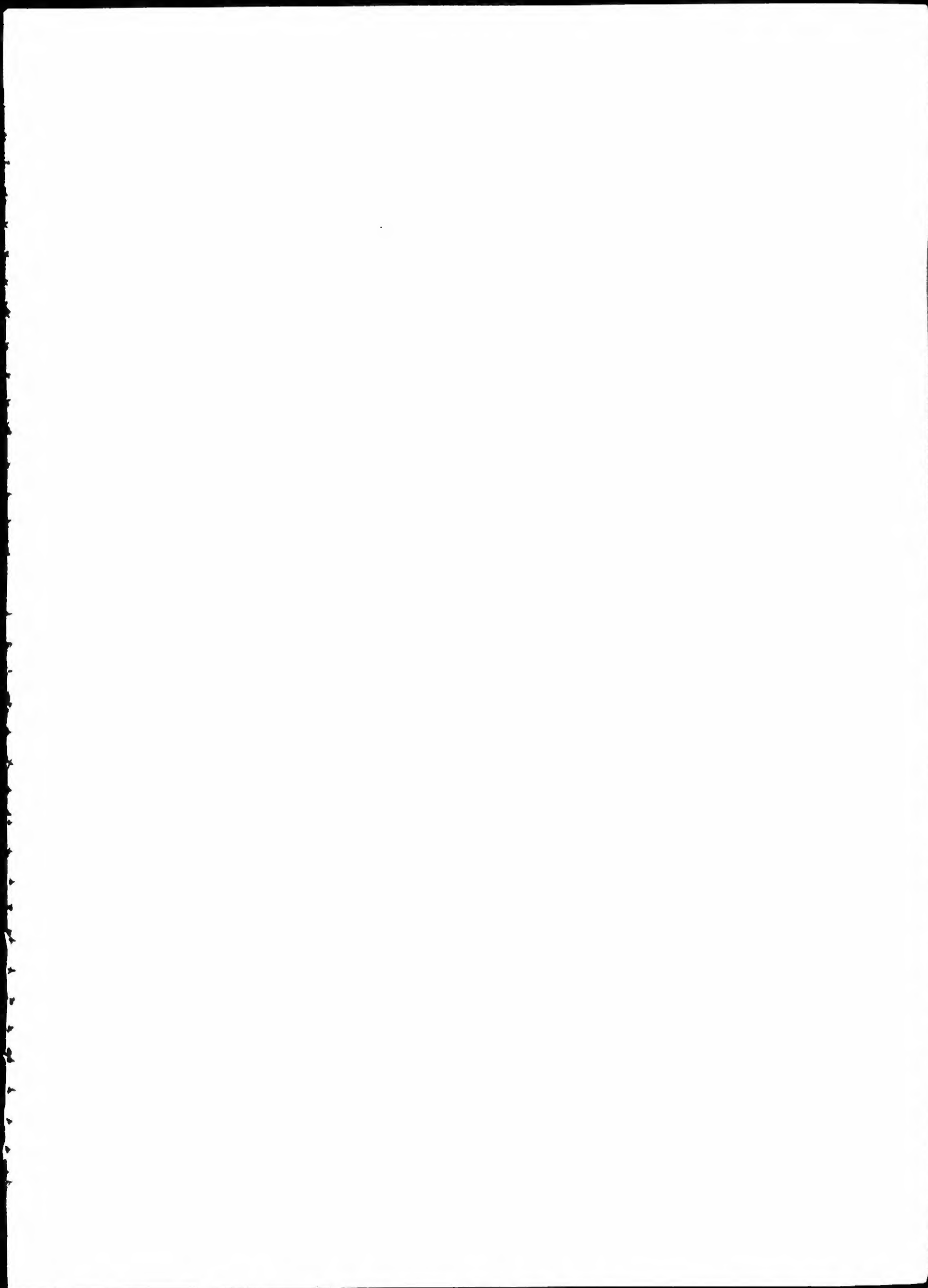


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[Filed Nov. 8, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDITH S. MARKUS
825 Juniper Street, N. W.
Washington, D. C.

Plaintiff

v.

Civil Action No. 2736-'63

PENN MUTUAL LIFE INSURANCE CO.
a corporation
1331 G Street, N. W.
Washington, D. C.

Serve: Albert F. Jordan
Superintendent of Insurance
1145 - 19th Street, N. W.
Washington, D. C.
Defendant

COMPLAINT

(Reformation - Estoppel - Damages)

1. The claim for relief herein on behalf of the plaintiff, Edith S. Markus, against the defendant, Penn Mutual Life Insurance Company, a corporation, is for an amount in excess of Ten Thousand (\$10,000.00) Dollars and is within the jurisdiction of this Court.

2. Plaintiff Edith S. Markus brings this suit as beneficiary named by Samuel J. Sugar, deceased, in said decedent's Election of Annuity under the Penn Mutual Life Insurance Company's Retirement Plan For Full-Time Agency Field Representative.

3. In January 1941 Samuel J. Sugar, said decedent, became a member of defendant Penn Mutual Life Insurance Company's Retirement Plan for Full-Time Agency Field Representatives and remained a member in good standing to and including the time of his death, November 8, 1962.

4. October 1, 1961, said decedent, Samuel J. Sugar, was suffering from cancer and although unknown to him had at that time a life expectancy of approximately six months to one year. Thereafter on the 1st day of March 1962, being then 59 years of age and eligible under the terms of said Retirement Plan to retire, he was obliged by ill health to retire from any activity as Agent for defendant and was inactive and, in fact, did at that time retire as a Full-Time Agency Field Representative and defendant was well aware of his said retirement and consented thereto.

5. On September 1, 1962, said decedent, Samuel J. Sugar informed defendant he wished to formalize his retirement and avail himself of a deferred paid-up annuity and to change the beneficiary named by him to his sister, plaintiff herein, and requested the advice of defendant as to the option to be designated by him to secure the maximum benefits under said Retirement Plan for his sister, plaintiff herein, after his death.

6. Said decedent, Samuel J. Sugar, was eligible, having retired, to receive at said time the full benefits of the life annuities under Option 1 of said Plan.

7. Defendant had full knowledge that the death of Samuel J. Sugar was imminent and knew that said Samuel J. Sugar did not himself realize how grave his physical condition was and that his death was imminent but believed that he would live for an indefinite period of time.

8. Defendant owed the duty of designating said Samuel J. Sugar's status on its records as a retired employee and accord to him the full benefits accruing to members upon retirement.

9. Defendant further owed the duty of using its utmost efforts to induce Samuel J. Sugar to make his retirement effective at once but instead in violation of its duty advised said Samuel J. Sugar as to the benefits which would be paid in the event of his retirement as of the 11th day of November, 1962, at which time he would be 60 years of age.

10. Defendant owed the duty to advise Samuel J. Sugar that it was to defendant's advantage for the date of retirement to be advanced as in the event of his death prior thereto defendant would be benefitted in the amount of Sixteen Thousand (\$16,000.00) Dollars and that the intended beneficiary would receive no benefits whatsoever.

11. October 1, 1962, Samuel J. Sugar by written notice to defendant elected Option 1 under said Retirement Plan and changed the beneficiary of said Plan to his sister, Edith S. Markus, plaintiff herein, and acting upon the advice of defendant stated the date of his retirement as November 11, 1962.

12. It then and there became the duty of defendant, Samuel J. Sugar having in fact retired, to make his retirement effective as of his election of receiving benefits under Option 1, October 1, 1962.

13. Samuel J. Sugar died November 8, 1962. Defendant having received due notice and proof of death, plaintiff has demanded payment of the benefits as beneficiary due and payable under Option 1 of said Retirement Plan For Full-Time Agency Field Representatives as the designated beneficiary therein.

14. Defendant has failed and refused to pay such benefits to plaintiff or any part thereof and now fails and refuses to make payment.

WHEREFORE, plaintiff prays:

1. That plaintiff be awarded damages in the sum of Thirty Thousand (\$30,000.00) Dollars.

2. That the defendant be estopped from denying that Samuel J. Sugar retired on October 1, 1962.

3. That the Court declare:

(a) That Option 1 of said Retirement Plan For Full-Time Agency Field Representatives be deemed to have been in force and that said Samuel J. Sugar had in fact retired as of October 1, 1962.

(b) That plaintiff as beneficiary is entitled to the benefits payable under Option 1 of the Retirement Plan For Full-Time Agency Field Representatives of the Penn Mutual Life Insurance Company.

(c) That the Court reform ELECTION OF ANNUITY so that it became effective as of October 1, 1962.

4. And for such other and further relief as to this Court shall seem just and proper.

David G. Bress

Foster Wood

Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues of fact.

David G. Bress

[Filed 12/10/63]

ANSWER

Answering the complaint herein, by paragraphs, defendant states as follows:

1. Defendant admits the allegations of paragraph 1.
2. Defendant admits the allegations of paragraph 2.
3. Defendant admits the allegations of paragraph 3.
4. Defendant is without knowledge sufficient to form a belief as to the health or actual life expectancy of Samuel J. Sugar on October 1, 1961. Defendant denies that Samuel J. Sugar retired as a full-time Agency Field Representative on March 1, 1962, and states that he requested retirement as of November 11, 1962, but died prior thereto, to-wit, on November 8, 1962.

5. Defendant admits that on or about September 1, 1962, decedent Samuel J. Sugar notified defendant's general agent, Wayne E. Dorman, of his intention to elect the privilege of early retirement under defend-

ant's retirement plan, and consulted with the said Dorman about the terms and effect thereof. Defendant denies the remaining allegations of paragraph 5.

6. Defendant denies the allegations of paragraph 6.

7. Defendant denies the allegations of paragraph 7.

8. Defendant denies that it had a duty to designate decedent as a retired employee and to accord him the benefits of such status as of September 1, 1962, or as of any date other than the date selected by decedent, to-wit, November 11, 1962.

9. Defendant admits that it advised decedent, at his request, as to the benefits which would be paid in the event of his retirement as of November 11, 1962, at which time he would be 60 years of age. Defendant denies the remaining allegations of paragraph 9.

10. Defendant admits that in the event of decedent's death prior to his retirement his designation of a beneficiary to receive certain death benefits under defendant's retirement plan would not take effect. Defendant denies the remaining allegations of paragraph 10.

11. Defendant denies that decedent fixed the date of his retirement, namely, November 11, 1962, upon the advice of defendant. Defendant admits the remaining allegations of paragraph 11.

12. Defendant denies the allegations of paragraph 12.

13. Defendant admits the allegations of paragraph 13.

14. Defendant admits the allegations of paragraph 14.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed and that defendant be awarded its costs.

/s/ Frederick A. Ballard

/s/ John W. Kern, III

Attorneys for Defendant

Dated; December 10, 1963

[Certificate of Service, Dec. 10, 1963]

[Filed 12/10/63]

THIRD-PARTY COMPLAINT

1. Plaintiff, Edith S. Markus has filed against defendant a complaint, copy of which is hereto attached as Exhibit B.

2. In her complaint, attached as Exhibit A, plaintiff seeks to recover from defendant damages in the sum of thirty thousand dollars (\$30,000), representing certain death benefits to which she would have been entitled under defendant's Agents' Retirement Plan, pursuant to her designation as beneficiary of Samuel J. Sugar's interest under such plan, had said Samuel J. Sugar lived to his retirement date of November 11, 1962. The \$30,000 thus sought to be recovered would have included, in part, the amount of Samuel J. Sugar's own contributions under the Agent's Retirement Plan, which (together with interest thereon) were paid by defendant to third-party defendants, in the amount of fourteen thousand, seventy-nine dollars and eighty-one cents (\$14,079.81), on December 17, 1962.

3. Accordingly, if plaintiff were to recover the \$30,000 sought by her complaint, from defendant, defendant would in turn be entitled to recover the portion of the \$30,000 already paid to third-party defendants as executors of the estate of Samuel J. Sugar.

WHEREFORE, defendant and third-party plaintiff, Penn Mutual Life Insurance Company, demands judgment against third-party defendants, I. Lewis Markus and Marvin L. Sugar, as executors of the Estate of Samuel J. Sugar, deceased, for all sums that may be adjudged against defendant, Penn Mutual Life Insurance Company in favor of plaintiff, Edith S. Markus, at least to the extent of fourteen thousand seventy-nine dollars and eighty-one cents (\$14,079.81); together with such further relief as the court may deem proper.

/s/ Frederick A. Ballard

/s/ John W. Kern, III

Attorneys for Penn Mutual Life
Insurance Company, Defendant
and Third-Party Plaintiff.

[Filed Jan. 7, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDITH S. MARKUS
825 Juniper Street, N. W.
Washington, D. C.

Plaintiff

vs

Civil Action No. 2736-63

PENN MUTUAL LIFE INSURANCE
CO., a corporation
1331 G Street, N.W.
Washington, D. C.

Defendant and Third-
Party Plaintiff

vs

I. LEWIS MARKUS
825 Juniper Street, N.W.
Washington, D. C.

MARVIN L. SUGAR
412 Investment Building
Washington, D. C.

Exeutors, Estate of Samuel J.
Sugar, Deceased

Third-Party
Defendants

**JOINT ANSWER OF I. LEWIS MARKUS AND MARVIN
L. SUGAR, EXECUTORS OF THE ESTATE OF SAMUEL
J. SUGAR, DECEASED, THIRD-PARTY DEFENDANTS,
TO THIRD-PARTY COMPLAINT OF PENN MUTUAL
LIFE INSURANCE CO., DEFENDANT AND THIRD-
PARTY PLAINTIFF**

For their joint answer to the Third-Party Complaint of Penn
Mutual Life Insurance Co., Defendant and Third-Party Plaintiff herein,

I. Lewis Markus and Marvin L. Sugar, Executors of the Estate of Samuel J. Sugar, Deceased, Third-Party Defendants herein, represent to this Court as follows:

1. They admit that they are the duly appointed, qualified and acting co-executors of the Estate of Samuel J. Sugar, Deceased, Administration No. 107269 in the Probate Branch of this Court, and that in this capacity they received from Penn Mutual Life Insurance Co. the sum of \$14,079.81.

2. They neither admit nor deny the other allegations of the Third-Party Complaint, including any references therein to the original Complaint of the Plaintiff, but if the same be material, demand strict proof thereof.

3. The controversy herein is between the plaintiff, Edith Markus, and the Defendant, Penn Mutual Life Insurance Co.; therefore, whatever the outcome thereof, the Estate of Samuel J. Sugar should not be charged with any of the expenses of this litigation, and further should be reimbursed for any expenses which it may incur, including attorney's fees.

WHEREFORE, the premises considered, these Third-party Defendants pray as follows:

(a) That the Third-Party Complaint be dismissed with all costs assessed against either the Plaintiff or the Defendant and Third-Party Plaintiff as the case may be.

(b) That the Third-Party Defendants be allowed such amount as will fully reimburse them for the expenses incurred by them in this litigation including reasonable attorney's fees; and in the event of a decision which will require them to refund the money received by them from Penn Mutual Life Insurance Co., the Defendant and Third-Party Plaintiff herein, then in such event they shall have the right to a set-off and to deduct such allowance from the funds in their possession.

(c) For such other and further relief as the nature of the case may require and to the Court seem just and proper.

/s/ Leon M. Shinberg
Attorney for I. Lewis Markus
and Marvin L. Sugar, Co-Executors of the Estate of Samuel J. Sugar, Deceased, Third-Party Defendants

[Certificate of Service, 3 Jan. 1964]

[Filed Jan. 29, 1965]

**ANSWER OF DEFENDANT PENN MUTUAL
LIFE INSURANCE COMPANY TO INTER-
ROGATORIES PROPOUNDED BY PLAINTIFF**

1. State the name, home address, business address, and title of the person answering these interrogatories on behalf of the defendant.

Answer: Wilkins S. Thomson, Assistant Vice President

Home Address: 18 - 8th Ave., Haddon Heights, N. J.

Business Address: The Penn Mutual Life Insurance Co.
530 Walnut Street
Philadelphia, Pennsylvania 19105

2. State the date on which Samuel J. Sugar first became associated in any way with the Penn Mutual Life Insurance Co.

A. July 30, 1931.

3. Please state the relationship between Samuel J. Sugar and the Penn Mutual Life Insurance Co. on the date stated in answer to interrogatory number 2, giving fully and in detail the duties the said Samuel J. Sugar was to perform.

A. Samuel J. Sugar was appointed an Agent of Crowley & Marr,

General Agents, for the purpose of procuring insurance for The Penn Mutual Life Insurance Company by contract with Crowley & Marr.

4. If the relationship between Samuel J. Sugar and the Penn Mutual Life Insurance Co. changed at any time between the date stated in answer to interrogatory number 2 and November 8, 1962, please state the date of said change and set out fully and in detail the nature of the change, if any, in the relationship and set out fully and in detail the change, if any, in the duties the said Samuel J. Sugar was to perform for the defendant.

A. On June 28, 1944, Samuel J. Sugar entered into a new contract, effective July 1, 1964, with Crowley & Marr, General Agents. Mr. Crowley died March 19, 1950 and Mr. Marr became successor General Agent. By agreement dated March 20, 1950 Mr. Sugar's contract was continued by Mr. Marr without interruption. Mr. Marr's contract as general agent was terminated April 30, 1955 and Mr. Wayne E. Dorman became successor General Agent. By agreement dated May 1, 1955 Mr. Sugar's contract was continued by Mr. Dorman without interruption. This relationship continued until Mr. Sugar's death.

5. State the date on which the defendant first received knowledge that Samuel J. Sugar was suffering from cancer.

6. How was the information that said Samuel J. Sugar was suffering from cancer conveyed to the defendant?

A. (5-6) On or about December 1, 1961, the Company was advised that Mr. Sugar had been operated on for a "parotid gland tumor." The fact that this tumor was malignant probably became known to the Company in the spring or summer of 1962, as a result of conversations between officials of the Agency Department and Mr. Wayne E. Dorman, then General Agent of the Company in Washington.

7. If the information that Samuel J. Sugar was suffering from cancer was conveyed to the defendant by a writing or writings please answer the following questions:

(a) State the date of each writing.

(b) State the name and address of the person sending the writing to the defendant.

(c) State the name, address and title of the person receiving the writing on behalf of the defendant.

(d) State the name, address and title of the person having possession of the writing at the present time.

(e) State whether each writing was a letter or an official company form.

(f) If the writing was an official Company form please describe the form and state the purpose for which it was used.

A. The notification to the Company (see answer to Nos. 5-6 above) was received on the Company's form, "Statement of Claim", under the Company's group health insurance program for Agents.

8. State the names, addresses, and titles of all persons in the District of Columbia authorized to act on behalf of the defendant and bind the defendant by their actions.

A. None.

9. State the condition of Samuel J. Sugar's health on September 1, 1962.

A. On August 15, 1962 he was determined to be disabled under the terms of the Disability Waiver of Premium Agreement contained in policies 2 631 938 and 2 638 336 on his life.

No specific knowledge of his condition on September 1, 1962.

10. State the condition of Samuel J. Sugar's health on October 1, 1962.

A. No factual knowledge as to condition on this date - Letter of September 26, 1962 from Delora M. Lawrence, Cashier - Wayne Dorman Agency, indicated Mr. Sugar "is home now and house confined."

11. State the names and addresses of all officers, agents and employees of the defendant with knowledge of Samuel J. Sugar's health from November 8, 1961 to November 8, 1962, and specify which, if any, of them are physicians or persons with a medical background.

A. John M. Huebner, Senior Vice President, The Penn Mutual Life Insurance Company, 530 Walnut Street, Philadelphia, Pennsylvania

W. S. Thomson, Assistant Vice President - address same as above

John K. Cooney, Supervisor of Claims - Disability and Health - address same as above

James B. Copple, Jr., Associate Actuary - address same as above

A. W. McCuen, Asst. Supervisor of Applications - address same as above

Dr. John R. Bowen, Assoc. Medical Director - address same as above

L. S. Fredericks, Senior Underwriter - address same as above

The only one who is a physician is Dr. John R. Bowen, however, Messrs. John M. Huebner, W. S. Thomson, John K. Cooney, A. W. McCuen and L. S. Fredericks have some familiarity with medical impairments through their work associations.

12. Did the defendant at any time within 12 months of Samuel J. Sugar's death secure a medical opinion or opinions relative to the health of the said Samuel J. Sugar?

A. Yes.

13. If your answer to interrogatory number 12 is affirmative please answer the following questions:

(a) State the dates each opinion was secured.

(b) State the name, address, and title of the person giving the opinion.

(c) State whether the person giving the opinion was employed by the defendant.

(d) If the person giving the opinion was not employed by the defendant state what relation, if any,,that person had with the defendant.

- (e) State whether the opinion was oral or in writing.
- (f) If the opinion was oral state the opinion fully and in detail.
- (g) If the opinion was in writing state the names, addresses and titles of the persons having possession of said writing.

A. (a) (1) November 28, 1961 - Attending Physician's Statement (Group Insurance).

(2) December 21, 1961 - Statement to Whom It May Concern.

(3) August 11, 1962 - Attending Physician's Statement of Disability.

(4) August 13, 1962 - Phone conversation.

(b) (1) Dr. Samuel J. N. Sugar - 4637 Eastern Ave., Washington, D.C.

(2) Dr. Daniel Catlin - 655 Park Ave., New York 21, N. Y.

(3) Dr. Samuel J. N. Sugar - 4637 Eastern Ave., Washington, D.C.

(4) Dr. Simpson

(c) No

(d) None

(e) See (a) above

(f) Dr. Bowen's memo of August 13, 1962 -

"I called Sam Sugar himself concerning what happened, and Sam, incidentally, sounded terrible over the phone, as if he could hardly speak. Sam said that he goes to the Doctor about every 5 weeks to have eye lashes removed from his eyes. The Doctor pulls them out. I then called Dr. Simpson and he confirmed this. The Doctor stated that Sam is in very poor physical condition and he does not feel that he should do anything more than to try and make him comfortable as he does not have too much longer. He stated that the eye lashes are merely plucked out with tweezers and not cut."

(g) In counsel's possession.

14. State the date on which Samuel J. Sugar ceased to operate as a full time Agency Field Representative of the defendant due to his health.

A. Mr. Sugar continued in the status of a full time Agent of the Company's General Agent until his death. However, the Company's Agency Department officials understand that he "ceased to operate" full time for several months before his death.

15. State fully and in detail the procedure by which Samuel J. Sugar requested retirement as of November 11, 1962, as alleged in paragraph 4 of your Answer filed herein.

A. Mr. Sugar requested retirement by executing, on October 1, 1962, and sending to the Company the Company's form entitled "Agents Retirement Plan - General Agents and Supervisors' Retirement Plan - Exercise of Privileges," and Company form entitled "Agents' Retirement Plan-General Agents' and Supervisors' Retirement Plan - Election of Annuity."

16. State the names, addresses, and titles of all agents, servants and employees of the defendant who consulted with Samuel J. Sugar relative to his retirement as an Agency Field Representative of the defendant.

A. To the best of our knowledge and belief the only such person was Wayne E. Dorman, General Agent, 1331 G Street, N. W. Washington, D. C. 20005

17. Describe each writing executed by Samuel J. Sugar in connection with his election of early retirement under the defendant's retirement plan, including in said description the date of each of said writings.

A. See No. 15

18. Was Samuel J. Sugar able to read the writings described in the answer to the preceding interrogatory or was it necessary for an agent, servant or employee of the defendant, or some other person, to read some or all of those writings to him?

A. We had no reason to believe he could not read forms he completed.

19. In the event it was necessary for an agent, servant or employee of the defendant, or some other person, to read any of the writings described in the two preceding interrogatories to the said Samuel J. Sugar please answer the following questions:

(a) Describe which of the writings were read to Samuel J. Sugar.

(b) State the dates on which the writings were read to Samuel J. Sugar.

(c) State the names, addresses and titles of the persons reading the said writings to Samuel J. Sugar.

(d) State fully and in detail the reason it was necessary to read said writings to Samuel J. Sugar.

A. (a) No knowledge of such requirement.

(b) --

(c) --

(d) --

20. Please state in dollars the amount which would have been payable to the personal representative or beneficiary of Samuel J. Sugar under the defendant's retirement plan had the said Samuel J. Sugar elected to retire on September 1, 1962.

A. If Mr. Sugar had elected to retire on September 1, 1962 and had elected Option 1 (refund life annuity) his monthly income under this option would have been \$161.56. If he had received such income payments on September 1, October 1 and November 1, 1962 and then died on November 8, 1962, income payments would have been continued to his beneficiary until the total payments made to Mr. Sugar or his beneficiary equaled \$29,599.65, the actuarial value as of the date of retirement of the life annuity which would have been payable had he not elected Option 1. If the election of Option 1 so provided his beneficiary could have elected to receive in one sum the commuted value of the remaining refund payments in lieu of receiving payment as an income. As of the date of death, November 8, 1962, the commuted value of the remaining refund payments was \$23,325.90.

21. Please state in dollars the amount which would have been payable to the personal representative or beneficiary of Samuel J. Sugar under the defendant's retirement plan had the said Samuel J. Sugar elected to retire on October 1, 1962.

A. If Mr. Sugar had elected to retire on October 1, 1962 and had elected Option 1 (refund life annuity) his monthly income under this option would have been \$162.99. If he had received such income payments on October 1 and November 1, 1962 and then died on November 8, 1962, income payments would have been continued to his beneficiary until the total payments made to Mr. Sugar or his beneficiary equaled \$29,799.90, the actuarial value as of the date of retirement of the life annuity which would have been payable had he not elected Option 1. If the election of Option 1 so provided his beneficiary could have elected to receive in one sum the commuted value of the remaining refund payments in lieu of receiving payment as an income. As of the date of death, November 8, 1962, the commuted value of the remaining refund payments was \$23,589.07.

22. Please state in dollars the amount which would have been payable to the personal representative or beneficiary of Samuel J. Sugar under the defendant's retirement plan had the said Samuel J. Sugar elected to retire on November 1, 1962.

A. If Mr. Sugar had elected to retire on November 1, 1962 and had elected Option 1 (refund life annuity) his monthly income under this option would have been \$164.43. If he had received an income payment in such amount on November 1, 1962 and then died on November 8, 1962, income payments would have been continued to his beneficiary until the total payments made to Mr. Sugar or his beneficiary equaled \$30,001.04, the actuarial value as of the date of retirement of the life annuity which would have been payable had he not elected Option 1. If the election of Option 1 so provided his beneficiary could have elected to receive in one sum the commuted value of the remaining refund

payments in lieu of receiving payment as an income. As of the date of death, November 8, 1962, the commuted value of the remaining refund payments was \$23,855.87.

23. Please state in dollars the amount the defendant received for the month of September 1962, as Samuel J. Sugar's contribution to defendant's retirement plan.

A. \$57.73.

24. Please state in dollars the amount the defendant received for the month of October 1962, as Samuel J. Sugar's contribution to defendant's retirement plan.

A. \$57.73.

25. Please state in dollars the amount the defendant received for the month of November 1962, as Samuel J. Sugar's contribution to defendant's retirement plan.

A. 0

26. Do you admit that the defendant raised the question of early retirement of Samuel J. Sugar on the defendant's initiative, as stated in a letter of December 11, 1962, from John M. Huebner, Senior Vice President of the defendant corporation?

A. Yes.

27. If your answer to interrogatory number 26 is affirmative please answer the following questions:

(a) State fully and in detail the procedure which was followed by the company in raising said question.

(b) State the names, addresses, and titles of all officers, agents and employees of the defendant who were involved in connection with this matter.

(c) Please state fully and in detail the facts upon which the defendant based its actions of raising the question of Samuel J. Sugar's early retirement.

(d) Please state the names, addresses, and titles of all persons

who discussed the question of Samuel J. Sugar's early retirement prior to the time that the question was discussed with Samuel J. Sugar.

(e) Please state the dates on which the question of early retirement was discussed between representatives of the defendant corporation and Samuel J. Sugar.

(f) Please state the substance of all discussions between representatives of the defendant and Samuel J. Sugar relative to the early retirement of Samuel J. Sugar.

(g) Please state what, if any, physical deterioration in the condition of Samuel J. Sugar occurred between the time of the initial discussion of the early retirement of Samuel J. Sugar and the finalizing of Samuel J. Sugar's election to seek early retirement.

(h) Was Samuel J. Sugar in pain at any time during the discussion set out in any of the preceding answers to this interrogatory?

(i) Was Samuel J. Sugar under medication or sedation during any of the discussions relative to his early retirement?

(j) Had Samuel J. Sugar sustained any weight loss between the time of the initial discussions of the question of his early retirement and the execution of his election of early retirement?

A. (a) to (f) Wilkins S. Thomson of the Company's Agency Department suggested to Wayne E. Dorman, the Company's General Agent in Washington, D. C., that Mr. Sugar be urged to consider early retirement in view of his condition. Mr. Dorman discussed the matter with Mr. Sugar several times in August and September, 1962. Mr. Sugar refused to retire before his 60th birthday which would have been on November 11, 1962, and elected that date.

(g) to (j) Unknown to defendant.

28. Did the defendant at any time have knowledge that Samuel J. Sugar was having difficulty with his vision?

A. Yes.

29. If your answer to interrogatory number 28 is affirmative please answer the following questions:

(a) State the date on which the defendant first received knowledge that Samuel J. Sugar was having difficulty with his vision.

(b) State all subsequent dates on which the defendant received knowledge that Samuel J. Sugar was having difficulty with his vision.

(c) State the method by which the defendant received information that Samuel J. Sugar was having difficulty with his vision.

(d) State the names, addresses, and titles of all representatives and officers of the defendant who had knowledge that Samuel J. Sugar was having difficulty with his vision.

A. (a) On July 24, 1962 Mr. Sugar, in a letter regarding his claim, advised "Dr. Simpson has been rendering services covering removal of eyelashes which grow through the incisions made to my left eye at the time of the original operation." In memo of August 2, 1962 referred to above, it was stated "vision in the left eye became affected and Mr. Sugar began seeing double."

(b) Attending Physician's Statement of Disability completed by Dr. S. J. N. Sugar on August 11, 1962 indicated "Double Vision". On August 13, 1962 Dr. Bowen talked to Sam Sugar and Dr. Simpson re eye impairment. Insured's Statement of Disability dated August 13, 1962 by Sam Sugar indicated "vision is bad".

(c) See (b) above.

(d) Dr. John R. Bowen, Associate Medical Director, The Penn Mutual Life Insurance Company, 530 Walnut Street, Philadelphia, Pennsylvania

John K. Cooney, Asst. Supervisor of Claims - address same as above.

W. Roland Evans - address same as above.

Wayne Dorman, General Agent, 1331 G St., N. W., Washington, D.

C.

30. Did any officers, agents or employees of the Home Office of the defendant visit Samuel J. Sugar after he became ill?

A. Yes.

31. If your answer to interrogatory number 30 is affirmative please answer the following questions:

(a) State the names and addresses of those parties who visited Samuel J. Sugar.

(b) State the dates of each visit.

(c) State the place of the visit.

A. (a) Albert W. McCuen, Asst. Supervisor of Applications, The Penn Mutual Life Insurance Company, 530 Walnut Street, Philadelphia, Pennsylvania

Leonard S. Fredericks - address same as above.

(b) September 5, 1962.

(c) Mr. Sugar's office. Walked from office to restaurant about 4 blocks from office.

32. Did the defendant have knowledge, prior to the death of Samuel J. Sugar, that the said Samuel J. Sugar had been classified as totally disabled by the Mutual Life Insurance Company of New York or any other company?

A. Not indicated in file.

33. Did anyone on behalf of the defendant explain to Samuel J. Sugar the advantages and disadvantages of his waiting from September 1, 1962 until November 11, 1962 to effect his early retirement in view of the fact that he was suffering from cancer?

A. No; Mr. Sugar knew the advantages and disadvantages of his own knowledge, see also answer to No. 27, above.

34. If your answer to interrogatory number 33 is affirmative please answer the following questions:

(a) State the names, addresses, and titles of the officers, agents or representatives of the defendant who so advised Samuel J. Sugar.

(b) Please state what advantages Samuel J. Sugar would have received by waiting from September 1, 1962 until November 11, 1962 to effect his early retirement.

(c) Please state what disadvantages there would be in Samuel J. Sugar waiting from September 1, 1962 until November 11, 1962 to effect his early retirement.

A. (a) - (c). Not applicable.

35. Please state the reason, if any, that November 11, 1962 was chosen as the date of Samuel J. Sugar's early retirement.

A. No personal knowledge. Marvin L. Sugar's letter of December 7, 1962 states "his (Samuel J. Sugar) last challenge was to live to see his 60th birthday which would have been November 11th. It was for this reason and this alone that he picked this date - and stuck to it."

36. In a letter dated December 11, 1962, John M. Huebner, Senior Vice President of the defendant corporation wrote to Mr. Marvin L. Sugar, and stated "However, I have to say that I believe most sincerely that the Company has discharged all moral obligation. It raised this whole question of early retirement on its own initiative and, as I believe you know, it argued for what it believed would be the wisdom of an earlier election. However, your Dad was firm, and since he had the right to make any choice he wished, whatever were his motives, we must follow his instructions." With reference to this paragraph please answer the following questions:

(a) State the names and addresses of all representatives of the company who argued for an earlier election by Samuel J. Sugar.

(b) State the dates on which representatives of the defendant argued for an earlier election on behalf of Samuel J. Sugar.

(c) State whether the "arguments" were conducted in writing or in person with Samuel J. Sugar.

(d) If the arguments were conducted in writing please state the dates of each writing; the name of the person sending the writing on behalf of the defendant; and identify the contents of the writing.

(e) If the arguments were conducted orally please state the dates of the arguments; the place the arguments took place; and the names and addresses of all persons present on each occasion.

- A. (a) Wayne E. Dorman, General Agent for Washington, D.C.
(b) See No. 27.
(c) In person.
(d) Not applicable.
(e) See No. 27.

37. Please state the names, addresses and titles of all officers, agents servants and employees of the defendant corporation with knowledge of the facts surrounding Samuel J. Sugar's illness and election of early retirement, which names have not heretofore been given in answer to any of the interrogatories.

A. None known to defendant.

/s/ Wilkins S. Thomson

[Filed Feb. 3, 1966]

**MOTION OF DEFENDANT FOR
SUMMARY JUDGMENT**

Defendant, The Penn Mutual Life Insurance Company, moves for summary judgment, pursuant to Rule 56, F.R.C.P., on the ground that the pleadings, interrogatories, and answers to interrogatories, depositions and exhibits attached thereto show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

This is an action for (a) reformation of an "Election of Annuity" made by Samuel J. Sugar, a deceased agent of defendant, under defendant's retirement plan for its agents, (b) estoppel of defendant from denying that the deceased Sugar retired on October 1, 1962 (the date he made the election of annuity), and (c) damages in the amount of \$30,000 (the approximate amount of the total payments which would have been paid

to plaintiff, as Sugar's designated beneficiary, if he had lived until his retirement date, when the beneficiary's rights would have accrued).

Defendant's answer denies all allegations of substance of the complaint. The record contains depositions of the plaintiff, Edith S. Markus; Marvin L. Sugar, son of the deceased, Samuel J. Sugar; Wayne E. Dorman, the local General Agent of defendant; Wilkins S. Thomson, Assistant Vice President of defendant; and of Dr. John R. Bowen, Associate Director of defendant. Also in the record are plaintiff's interrogatories and defendant's answers thereto. A Third-Party Complaint was filed by defendant against I. Lewis Markus, husband of plaintiff, and Marvin L. Sugar, son of Samuel J. Sugar, in their capacities as executors of the estate of Samuel J. Sugar, deceased; defendant had already paid to the executors fourteen thousand seventy-nine dollars and eighty-one cents (\$14,079.81) on December 17, 1962, which was the total of Sugar's personal contributions to the Retirement Plan, and the Third-Party Complaint was filed because if plaintiff were to recover the \$30,000 sought by her from defendant, defendant would be entitled to recover the above sum already paid to the executors.

The complaint alleges that: Plaintiff, Edith S. Markus, sister of Samuel J. Sugar, was the beneficiary named by Sugar in his Election of Annuity under the agents' retirement plan; on October 1, 1961, Sugar was suffering from cancer and did not know that he had a life expectancy of six months to a year; on March 1, 1962, Sugar retired "as a Full-Time Agency Field Representative and defendant was well aware of his said retirement and consented thereto"; on September 1, 1962, Sugar informed defendant of his desire "to formalize his retirement" and to elect the option for a deferred paid-up annuity with plaintiff Markus to be his beneficiary thereunder; defendant knew Sugar's death was imminent and Sugar did not know but believed he would live an indefinite length of time; defendant owed the duty of designating Sugar's status on its records "as a retired employee and accord to him the full benefits accruing to members upon retirement"; defendant owed a duty "to induce

Sugar to make his retirement effective at once but instead, in violation of this duty, advised Sugar as to the benefits which would be paid in the event of his retirement as of the 11th day of November, 1962, at which time he would be 60 years of age"; Sugar, on October 1, 1962, acting on advice of defendant fixed November 11, 1962, as his retirement date; it was the duty of defendant to make Sugar's retirement effective as of October 1, 1962; and Sugar died on November 8, 1962.

The action of Samuel J. Sugar in fixing his retirement date, referred to in the complaint, was taken by way of execution by Sugar of the Company's prescribed forms for electing early retirement and for fixing the date thereof. These forms were identified, on deposition, by Marvin L. Sugar, Sugar's son and business partner, and are marked, respectively, defendant's Exhibits 2 and 3 for identification; photocopies are attached hereto for convenience.

Therefore, in substance plaintiff alleges that although on October 1, 1962, Sugar elected November 11, 1962, as his date of retirement under the retirement plan, the Penn Mutual nevertheless has a legal duty to disregard this election and make his retirement effective as of another date, October 1, 1962. There being no allegation of fraud or misrepresentation, the basis for this claim appears to be that the Company knew but Sugar did not that his death was imminent (Comp't. par. 7); and, apparently, that the Company thus had a duty to force him to elect a date of retirement earlier than he wished. There is, however, nothing whatever in the record to suggest that the Company knew any more, if as much, about Sugar's condition than he did; to the contrary, the record shows that he knew only too clearly about his condition, see his memorandum of August 2, 1962, to the Company as to his condition (Deft's Exh. 4, identified on deposition of Marvin L. Sugar, copy attached hereto for convenience); and see his doctor's ^{1/} report of August 11,

^{1/} Dr. Samuel J. N. Sugar, was Samuel J. Sugar's cousin as well as his physician.

1962, identified on deposition of Dr. John R. Bowen as plaintiff's Exhibit No. 4 for identification (copy attached hereto for convenience). But even more importantly, the record shows affirmatively exactly why Sugar selected the date he did, and insisted on it despite the Company's suggestion that he elect an earlier date.

Plaintiff's own deposition demonstrates that she herself knows nothing about any basis for her complaint, see her deposition, pages 22-24, and passim. However, Samuel Sugar's son, Marvin L. Sugar, despite the constant evasiveness of his answers on his deposition, plainly does know the facts, since he was in the same office with his father during the relevant period. Marvin Sugar testified that he never discussed with his father the latter's status under the retirement plan (Dep. of Marvin L. Sugar 19, 20); and that he was not present at any discussions between his father and anyone connected with the Penn Mutual about his father's retirement (id. at 40). However, Marvin Sugar did testify that his father was "very well versed in the field," i.e., of retirement plans (id. at 15); and that the Penn Mutual's plan for its own agents was generally typical of the insured type of retirement plans (id. at 17); and that his father was a member of the Chartered Life Underwriters Society, the Estate Planning Council, the Leaders Club, the Million Dollar Round Table, the D.C. Association of Insurance Agents and the D.C. Life Underwriters' Association (id. at 51 and 52). And, finally, Marvin Sugar stated in a letter to the Company of December 7, 1962, that

"Knowing Dad as you did, I think you will understand, as I'm sure Wayne ^{2/} does, that his last challenge was to live to see his 60th birthday - which would have been November 11th. It was for this reason alone, I know, he picked this date - and stuck to

^{2/} Refers to Wayne E. Dorman, General Agent for the Penn Mutual in Washington.

it." (Deft's Exh. 5, deposition of Marvin L. Sugar, copy attached hereto for convenience, along with the Company's reply, which was marked defendant's Exhibit 6 for identification.)

Thus there is no basis for a claim that defendant violated any duty to Samuel Sugar — actually it went well beyond any moral obligation, not to mention any legal duty (see deposition of Wayne E. Dorman, p. 24 and passim). The only person (outside the Company) who knows the facts, his son and business partner, admits that his father's selection of November 11th was entirely of his father's own volition and indeed insistence.

Defendant accordingly submits that it is entitled to judgment as a matter of law.

/s/ Frederick A. Ballard

/s/ John L. Esterhai

Attorneys for Defendant.

Attachments:

1. Statement of Material Facts (under Local Rule 9(h))
2. Points and Authorities.
3. "Exercise of Privileges" form executed by Samuel J. Sugar October 1, 1962.
4. "Election of Annuity" form executed by Samuel J. Sugar October 1, 1962.
5. Samuel J. Sugar Memorandum of August 2, 1962.
6. Letter from Marvin L. Sugar to the Penn Mutual of December 7, 1962.
7. Reply to 6 by John M. Huebner of December 11, 1962.
8. Report of Dr. Samuel J. N. Sugar.

[Certificate of Service, 3 Feb. 1966]

[Attachment No. 1]

STATEMENT OF MATERIAL FACTS

(Pursuant to Local Rule 9 (h).)

1. Samuel J. Sugar, deceased, had been an agent of defendant Penn Mutual Life Insurance Company since 1931, and a member of Penn Mutual's Retirement Plan for Full-Time Agency Field Representatives since January, 1941. He was one of the Company's leading experts on retirement plans, including plans of the type represented by the Company's plan for its agents.

2. As of October 1, 1961, Samuel J. Sugar was suffering from cancer and was operated upon during that month for the removal of a parotid gland tumor.

3. Because of his deteriorating health Samuel J. Sugar elected to retire prior to his normal retirement date for purposes of the agents' retirement plan, which would have been his 65th birthday, or November 11, 1967. Accordingly, on October 1, 1962, he executed the designated form for that purpose, known as an "Exercise of Privileges" (Deft's Exhibit 2, Deposition of Marvin L. Sugar, copy attached hereto). On the same date Sugar designated his sister, the plaintiff, Edith S. Markus, as his beneficiary under the plan, by executing an "Election of Annuity" form, (Deft's Exhibit 3, Deposition of Marvin L. Sugar, copy attached hereto). On both forms he fixed November 11, 1962, his 60th birthday, as his retirement date.

4. Under the terms of the retirement plan an agent's beneficiary would be entitled to the agent's entire interest in the plan (including the value of the Company's contribution, together with his own contributions), if the agent should live until his stated retirement date. On the death of an agent prior to his stated retirement date the Company's obligation was limited to payment to his estate of the agent's own contributions to the fund with accrued interest; and no rights accrued to the agent's designated beneficiary.

5. Samuel J. Sugar died November 8, 1962, and hence was not living on his stated retirement date.

6. I. Lewis Markus and Marvin L. Sugar are the executors of the Estate of Samuel J. Sugar, deceased. On December 17, 1962, Penn Mutual paid to the executors of the Estate of Samuel J. Sugar the sum of fourteen thousand, seventy-nine dollars and eighty-one cents (\$14,079.81) which represented Samuel J. Sugar's personal contributions to the Retirement Plan, with interest.

/s/ Frederick A. Ballard

/s/ John L. Esterhai

Attorneys for Defendant

[Deft's Ex. No. 2]

[Attachment No. 3]

THE PENN MUTUAL LIFE INSURANCE COMPANY

Agent's Retirement Plan

General Agents' and Supervisors' Retirement Plan

EXERCISE OF PRIVILEGES

Name Mr. Samuel J. Sugar

Agency Wayne E. Dorman

EARLY RETIRMENT I exercise the privilege extended to me by the Agents' Retirement Plan to retire prior to my normal retirement date. The date elected by me is November 11, 1962.

Signed October 1st, 1962 at Wash., D.C.

/s/ Wayne E. Dorman
Witness

/s/ Samuel J. Sugar
Signature of Agent

[Deft's Ex. 3]

[Attachment No. 4]

THE PENN MUTUAL LIFE INSURANCE COMPANY
AGENTS' RETIREMENT PLAN - GENERAL AGENTS'
AND SUPERVISORS' RETIREMENT PLAN

ELECTION OF ANNUITY

Member Samuel J. Sugar Member's Date of Birth November 11, 1902

Agency Wayne E. Dorman Retirement Date November 11, 1962

I elect and direct that, subject to the provisions of the Agents' Retirement Plan and the General Agents' and Supervisors' Retirement Plan, the retirement benefits payable to me under either or both of such plans shall be paid as a straight life annuity unless payment under Option 1, 2 or 3 is directed below.

In lieu of payment as a straight life annuity, I elect and direct that my retirement benefits be applied under the option indicated below:

(Check choice if option desired.)

☒ Option 1.

A monthly refund life annuity to me with payments continued after my death to the extent required to make total payments equal the actuarial value on the Retirement Date of the straight life annuity which would have been payable in the absence of election of an option.

Any payments due after my death during the refund period shall be paid to Edith S. Markus (beneficiary), my Sister, if living on the date as of which payment falls due, otherwise to I. Lewis Markus (beneficiary) my Brother-in-law, if living on the date as of which payment falls due. Each such beneficiary while currently entitled to receive payments - ☐ shall - ☐ shall not - have the right to withdraw the commuted value of the remaining payments payable during the refund period. (If neither block is checked each beneficiary shall have such right of withdrawal.)

Upon the death of the last survivor of the beneficiaries designated

in the preceding paragraph and me, the commuted value of any remaining refund payments shall be paid to the executors or administrators of such last survivor.

The commuted value of any remaining unpaid refund payments shall be calculated on the basis of the interest rate or rates used in calculating the amount of the annuity payments under Option 1.

I reserve the right to change the designation of beneficiary under Option 1 as provided in the retirement plans.

☐ Option 2.

A monthly annuity payable during the joint lifetime of myself and _____ (joint annuitant), my _____, whose date of birth is _____, payable during our joint lifetime - ☐ to both of us jointly - ☐ to me - (if either is checked such payments shall be made to both of us jointly) and to the survivor until the death of the survivor.

☐ Option 3.

A monthly annuity to me and _____ (joint annuitant), my _____, whose date of birth is _____, during our joint lifetime, and to the survivor until the death of the survivor in an amount equal to two-thirds of the annuity payable during our joint lifetime.

An election of Option 1 shall be effective only if I am alive on the Retirement Date.

An election of Option 2 or 3 shall be effective only if both the joint annuitant and I are alive on the Retirement Date. If on the Retirement Date I am living and the joint annuitant is dead, payment of the retirement benefits shall be made to me as a straight life annuity.

Signed Oct. 1st 1962 at Wash., State of D.C.

Wayne E. Dorman
Signature of Witness

Samuel J. Sugar
Signature of Member

1331 G St., N.W., Wash., D.C.
Address of Witness

3900-16th Street, N.W., Washington, D.C.
Address of Member

[Deft's Ex. No. 4]
[Attachment No. 5]

SUGAR and SUGAR
Insurance
412 Investment Building Washington 5, D.C.

MEMORANDUM

August 2, 1962

Re: Illness of Samuel J. Sugar
Policies 2631398 & 2638336
Group Insurance Claim #11-002466

Operated on for removal of Parotid Gland tumor about October 25, 1961. Gland, 7th cranial nerve, lymph glands, and neck mastoid muscle - plus other items removed. In hospital for about 2-1/2 weeks, then at home for about 3-1/2 weeks before visiting the office. Came into the office for a few hours daily thereafter until around March 1st when trouble developed in left arm and esophagus. Visited orthopedic doctor, physiotherapist doctor, throat doctor, surgeon who did the original operating in New York, and was referred to local cancer man, Dr. T. Crandall Alford. X-Ray pictures indicated tumor cells still present and X-Ray treatments were begun by a Dr. Ralph Caulk to the cervical spine for treatment to the arm that was carried in a sling for a few months. These lasted over one month and then X-Ray treatments began for stricture in the esophagus, after being in the hospital where a chest doctor attempted to get down in the throat but could not do so because of the angle of the left jaw. So, X-Ray treatments to the esophagus began. While these treatments were going on vision in the left eye became affected and Mr. Sugar began seeing double. The eye physician indicated something wrong with the 6th cranial nerve controlling the muscle of the left eye. Naturally, with the left arm and eye affected, Mr. Sugar cannot drive an automobile, and with the esophagus trouble cannot do much talking and cannot accept telephone calls. This has been true since March.

Mr. Sugar's routine is to go for an X-Ray treatment every morning at around 11:A.M., then go to his office where he looks at the mail, then has lunch, then takes a nap, then hangs around the office for another hour or two in order to keep himself from having too much idle time.

[Deft's Ex. No. 5]
[Attachment No. 6]

SUGAR and SUGAR
Insurance

SAMUEL J. SUGAR, CLU
Life Member
Million Dollar Round Table

General and Life Insurance

MARVIN L. SUGAR CLU
CLEO B. HAMERSKI Mgr

December 7, 1962

Mr. John Huebner, Senior Vice President
Penn Mutual Life Insurance Company
Independence Square
Philadelphia 5, Pa.

Dear John:

While in Wayne Dorman's office yesterday, he told me the decision that Penn Mutual had come to on the question I raised concerning the benefits to be paid under my late father's Retirement Plan Account.

As Wayne knows, my father was in a position to change the date of his retirement even as late as November 6, 1962 - just two days before he died. Knowing the situation completely, I might have suggested to Dad that he do this. But, as I would imagine you realize, I would not suggest this to him for any amount of money.

While I am completely familiar with the legal reasons given

Wayne for the refusal to pay Penn Mutual's contributions which accrued to his account, I cannot help having a feeling of complete disappointment from the moral point of view. It is true that I should not, perhaps, ask you to understand the many reasons why my father chose not to change his retirement date at the last moment. Knowing Dad as you did, I think you will understand, as I'm sure Wayne does, that his last challenge was to live to see his 60th birthday - which would have been November 11th. It was for this reason alone, I know, that he picked the date - and stuck to it.

When I think of the more than thirty years of loyal service he gave to the Penn Mutual - and the substantial and high quality production that resulted therefrom - it is disheartening to me that the Company has taken this position. As I told Wayne, in order to carry out my father's wishes, Penn Mutual would not grant him 3 days for over 30 years of service.

I am pleased that I am not in the position of a beneficiary on this matter so that my feelings can be expressed with no thought of possible gain to myself. I did want you to know, however, that I am deeply surprised and disappointed beyond words at the position Penn Mutual has taken on this matter.

Sincerely,

/s/ Marvin

Marvin L. Sugar, C.L.U.

[Deft's Ex. No. 6]
[Attachment No. 7]

December 11, 1962

Mr. Marvin L. Sugar, C.L.U.
Sugar and Sugar Insurance
412 Investment Building
Washington 5, D. C.

Dear Marv:

Please believe that I can understand the disappointment which prompted your letter of December 7th. I think I know the emotional pressures you have been under and it's a shame that a disappointment has to hit you under those circumstances.

However, I have to say that I believe most sincerely that the Company has discharged all moral obligation. It raised this whole question of early retirement on its own initiative and, as I believe you know, it argued for what it believed would be the wisdom of an earlier election. However, your Dad was firm, and since he had the right to make any choice he wished, whatever were his motives, we must follow his instructions.

Please, if you can, back off a bit and look at this problem, and I say problem advisedly, in its entirety. If you do you'll agree that the Company has no alternative except to follow its instructions.

Warmest regards,

/s/ John W. Huebner

STATEMENT OF GENUINE ISSUES

The following is a Statement of Genuine Issues concerning which material questions of fact are involved, pursuant to Rule 9(h) of the Rules of this Court:

- 1) what decedent's life expectancy was on October 1;
- 2) whether his doctors had advised him as to life expectancy, fully and accurately;
- 3) what his belief was as to life expectancy;
- 4) what knowledge defendant had or should have had as to life expectancy;
- 5) whether defendant made adequate efforts to induce Mr. Sugar to select an earlier retirement date;
- 6) whether in the circumstances defendant was under a duty to record Mr. Sugar as retired as of October 1, 1962;
- 7) whether in the circumstances defendant's conduct was inequitable and reformation is therefore appropriate; and
- 8) whether defendant is estopped to deny that Mr. Sugar's retirement was effective October 1, 1962.

HILMER, KLAVAN & KRUG

By /s/ Stanley Klavan
Attorneys for plaintiff

[Exhibit A]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

I, Stanley Klavan, being duly sworn, depose and say:

Acting as counsel for plaintiff in this matter, at a date subsequent to the deposition of Wayne Dorman, defendant's general agent, I examined the Dorman file relating to decedent, in the office of counsel for defendant. At that time I made an accurate longhand copy of a letter of Mr. Dorman dated August 3, 1962, appearing in that file, which is set forth below, marked Exhibit 1. The memorandum referred to in paragraph 2 of the letter is the memorandum dated August 2, 1962, a copy of which is set forth on page 2 of Plaintiff's Memorandum in Opposition to Motion for Summary Judgment.

/s/ Stanley Klavan

[Jurat, 28 Feb. 1966]

EXHIBIT 1 TO AFFIDAVIT

"August 3, 1962

"Mr. John K. Cooney
Asst. Supervisor of Claims
The Penn Mutual Life Insurance Co.
Independence Square
Philadelphia, Pennsylvania.

"Dear John:

"I am writing to you about Mr. Samuel J. Sugar and his disability claim in connection with his life insurance with our company. You will recall that I spoke to you about this last Thursday.

"I am enclosing a memorandum which outlines Mr. Sugar's difficulties since last October. Mr. Sugar has made a claim under our group insurance and that number is 11-002466. I am sure you will find certain doctors statements, etc., in that file.

"Since his son Marvin became associated with him some years ago, Mr. Sugar has been writing all his insurance business jointly with Marvin. To my knowledge, Sam has not been able to solicit the sale of life insurance this year. All of the business that has been submitted through our company has been written by his son Marvin.

"There is no question in my mind that Mr. Sugar is totally disabled in every sense of the word and I would appreciate it very much if you would discuss this, as you suggested with our medical staff immediately. I would also appreciate if you would call me on the telephone next Monday if at all possible. If after discussing this with our Medical Staff you would like additional information, I would like to set up a conference telephone call with Mr. Sugar, you and myself.

Sincerely,

Wayne E. Dorman, C.L.U.
General Agent"

**THE PENN MUTUAL AGENTS' RETIREMENT
PLAN AND GENERAL AGENTS' AND SUPER-
VISORS' RETIREMENT PLAN**

Article IV
Contributions

1. Contributions by Member: Prior to Normal Retirement Date each active member of the Plan is required to make monthly contributions at the annual rate of 3% of his Penn Mutual Income during the preceding calendar year up to a maximum of \$30,000 of such income or

monthly contributions of \$1.50 each (without regard to any contributions made under the General Agents' and Supervisors' Retirement Plan) if such Penn Mutual Income was less than \$600. Contributions based on annual Penn Mutual Income in excess of \$4,800 commence with those payable in January, 1952 except that at the option of the member the commencement of contributions based on such excess may be deferred until any month not later than July, 1952. Contributions shall terminate with the monthly payment due for the month immediately preceding the month in which the member's Normal Retirement Date or earlier termination of active membership occurs.

2. Additional Contributions by Member: An active member may elect in writing filed with the Company to make Additional Contributions, beginning on the following January 1, of 1%, 2% or 3% of his Penn Mutual Income during the preceding calendar year up to a maximum of \$4,800 of the aggregate of such income as defined in this Plan and in the General Agents' and Supervisors' Retirement Plan. The percentage rate of such Additional Contributions may be changed as of any January 1. Additional Contributions shall terminate at the time of termination of required contributions, and may, at the election of the member, be terminated (completely but not partially) as of the first day of the month following receipt by the Company of written notice of termination. Except in the case of a member returning from military service, an election to make Additional Contributions may not become effective before the January 1 following the expiration of one year from the date of termination of contributions under a previous election.

* * *

5. Contributions by Company: The Company shall make such contributions as are necessary to provide all the benefits under the Plan in excess of those provided by the members' contributions.

Article VApplication of Contributions and Renewal Commissions -
Provision for Annuities

1. Application of Member's Contributions - Retirement Annuities by Company: (a) Except as provided in (b) and (c) of this Section, at the end of each calendar year and upon retirement during the calendar year, the member's contributions made during the year (including any Additional Contributions) shall be applied to provide a paid-up retirement annuity commencing at Normal Retirement Date with refund upon death before retirement as provided in Article VIII, Section 1(a). In addition, the Company shall, at the time the member's contributions are applied, provide an additional retirement annuity commencing at Normal Retirement Date for such monthly amount of deferred life annuity without refund at death as would be purchased by a single premium equal to the member's required contributions for such year. The retirement annuities provided under this Article shall be on a basis determined by the Company, which basis shall apply uniformly to all members and shall not be less favorable to the member than the Company's net rates for single premium life annuities current at the time the annuities are provided.

* * *

2. Supplemental Retirement Annuity: The Company will provide Supplemental Retirement Annuities, subject to the following provisions:

(a) For members who have not retired prior to January 1, 1954, the Supplemental Retirement Annuity will be a deferred life annuity (without refund at death) commencing at Normal Retirement Date and for such monthly amount as would have been purchased by a series of single premiums applied during each year from 1941 to 1951, inclusive for which a retirement annuity is provided under Section I of this Article and equal to 3% of that portion, if any, of the member's Penn Mutual Income during the preceding calendar year which was in excess of \$4,800 but not in excess of \$30,000. The net single premium rates to

be used in determining the amount of the Supplemental Retirement Annuity will be based on the 1937 Standard Annuity Table with ages set back one year and 3% interest.

* * *

Article VI
Retirement

3. Early Retirement: A member who has attained age 55 and completed 15 years of membership in the Plan may retire prior to Normal Retirement Date by filing a written election with the Company provided that no member who joins the Plan under the provisions of Article III, Section 4 or 5 may elect to retire before completion of the contributions required by Article IV, Section 3 or 4.

* * *

Article VII
Retirement Annuity

1. Life Annuity: Upon reaching his retirement date, a member shall begin to receive a retirement annuity under the Plan payable monthly for the lifetime of the member (without refund at death), which shall be the sum of:

(a) the total of the paid-up retirement annuities provided under Article V, Section 1 prior to his retirement date, provided that if the member's retirement date is before or after his Normal Retirement Date his retirement annuity provided under such Section shall be the actuarial equivalent of the paid-up annuities which have been provided under such Section prior to his retirement date and which otherwise would have been payable at Normal Retirement Date,

(b) any Supplemental Retirement Annuity provided by Article V, Section 2 provided that if the member's retirement date is before or after his Normal Retirement Date his Supplemental Retirement Annuity provided under such Section shall be the actuarial equivalent of the annuity which otherwise would have been payable at Normal Retirement Date,

(c) if the member's retirement date is on or after his Normal Retirement Date, any Past Service Benefit and any Supplemental Past Service Benefit provided under Article IX, provided that if the member's retirement date is after his Normal Retirement Date his Past Service and Supplemental Past Service Benefits provided under such Article shall be the actuarial equivalent of the benefits which otherwise would have been payable at Normal Retirement Date, and

(d) at the member's election, any amount provided by applying the commuted value of any vested renewal commissions as provided in Article V, Section 3,

provided that any member who joins the Plan under the provisions of Article III, Section 4 or 5 shall not be considered to have retired and shall not begin to receive any retirement annuity until the completion of all contributions required by Article IV, Section 3 or 4, and provided further that, as used in this Section only, the Normal Retirement Date of such a member shall be deemed to be the date on which he completes such required contributions or his Normal Retirement Date as defined elsewhere in the Plan, whichever is later.

2. Optional Forms of Annuity: In lieu of the retirement annuity provided in Section 1 of this Article, upon retirement a member may elect to receive its actuarial equivalent under one of the following options, provided, however, that the Past Service Benefit or Supplemental Past Service Benefit provided under Article IX may not be paid under Option 1:

Option 1: A monthly life annuity providing for continuation of payments after death of the member to a beneficiary designated by the member, as provided in Article VIII, Section 1(b), until the total payments shall equal the actuarial value of the annuity at time of retirement if the total payments made before death shall be less than such value.

Option 2: A monthly annuity payable to him or to him and another person designated by him during the joint lifetime of the member and such person, and to the survivor until the death of the survivor.

* * *

Article VIII

Benefits on Death, Disability or Termination of Membership

1. Death Benefit: (a) Upon death of a member before retirement the Company will pay a death benefit in an amount equal to the member's total contributions plus 3% compound interest to the date of death, provided that no such death benefit will be paid if the member has received any payment of a disability benefit under Section 3 of this Article unless such payment has been repaid in accordance with Section 4 of this Article.

(b) The member shall have the right to designate a beneficiary of this death benefit and of any death benefit payable under Option 1 as provided in Article VII, Section 2 and to make subsequent changes in such designation by filing written notice at the Home Office of the Company. No beneficiary designation shall be effective until so filed but when so filed shall take effect as of the date it was made provided that any interest created thereby shall be subject to any payment made by the Company before its receipt at the Home Office. Payment of the death benefit shall be made to the beneficiary designated by the member or, if none has been designated, to his executors or administrators.

(c) A member may elect to have the death benefit provided in (a) of this Section made payable under any one of the income options included in Ordinary Life policies being issued by the Company as of January 1, 1954 or the date on which the agent becomes a member, whichever is later, subject to the basis and limitations contained in such policies. If at the death of a member no election of an option is then effective, the beneficiary entitled to the death benefit may elect one of such options.

5. Termination of Membership: When the membership of a member not classified as inactive because of retirement or disability terminates other than by reason of death, the Company shall pay to him the amount of his contributions and, if such termination occurs on or after January 1, 1954, 2% compound interest to the date of termination.

* * *

Article XIV
Reserves and Accounts

1. The contributions by members under this Plan will be collected in the agency field offices and remitted to the Home Office periodically. Individual accounts will be maintained for each member showing all contributions made by him and his retirement annuity established to date.

2. The Company shall maintain reserves for its liabilities for all benefits provided by the Plan. All contributions by members and by the Company shall be added to such reserves, which shall not thereafter be decreased except by payment of benefits under the Plan until all payments required by the Plan have been made.

3. The annuity reserve and any other funds pertaining to this Plan will not be set aside or treated as a separate fund but will be part of the general corporate funds of the Company.

Article XV
Administration

The administration and supervision of this Plan shall be the duty of the President, and he shall have full power to delegate this authority to any appointees whom he may select for this purpose. The President, and to the extent of the authority vested in them, his appointees, shall have authority and power to make binding constructions and interpretations of the provisions of this Plan, and, if they so determine, to promulgate such constructions and interpretations in the form of rulings and regulations.

Article XVI
Amendments and Guarantees

1. The Company reserves the right to change or discontinue the Plan at any time by action of the Board of Trustees but any change or discontinuance will not affect adversely annuities accrued by reason of contributions made by the members of the Company prior to the date of change or discontinuance. Except as provided in Sections 2 and 3 of this Article, payment of all benefits accruing prior to such change or discontinuance is guaranteed. In no event shall any amount contributed under the terms of the Plan, or the value of any annuity provided by such amount, be used for or diverted to purposes other than for the exclusive benefit of members or their beneficiaries as provided by the Plan until all liabilities to members or their beneficiaries resulting from the provisions of the Plan have been satisfied.

2. The Company expects to fund the Supplemental Retirement Annuities and the Supplemental Past Service Benefits by a series of approximately level contributions over a period of 10 years. These benefits will be guaranteed only to the extent that the Company makes the required contributions therefor, except that all benefits for retired members will become guaranteed on January 1, 1954 or on the member's Normal Retirement Date, whichever is later. Any contributions made by the Company for Supplemental Retirement Annuities and Supplemental Past Service Benefits and not required to guarantee benefits for members who have reached Normal Retirement Date will be applied to guarantee, upon retirement, benefits for members who have not reached Normal Retirement Date, in proportion to the total amount which would be required to guarantee all such benefits.

3. The Company does not guarantee any additional benefits accruing to members of the Plan under the amendments approved by the Agency Committee of the Board of Trustees on January 10, 1962 pursuant to authority granted by the Board of Trustees on November 8, 1961, before approval by the Internal Revenue Service of the Plan as

amended as a qualified plan under Section 401(a) of the Internal Revenue Code.

* * *

[Filed Apr. 6, 1966]

MEMORANDUM

Stanley Klavan, Esq., Washington, D. C., for the Plaintiff.

Frederick A. Ballard, Esq., Washington, D. C., for the Defendant.

Leon M. Shinberg, Esq., Washington, D. C., for the Third Party Defendants.

This matter came on for hearing on defendant's motion for summary judgment. From the file, including depositions and other evidentiary material submitted on behalf of both parties, it appears that the following are the facts: The decedent, Samuel Sugar, was an outstanding agent of the defendant company for about thirty years. During the latter portion of his service, he became ill with cancer. This required an operation, from the effects of which he did not recover. It appears that the decedent entered into a retirement policy with his company and pursuant to this agreement, made contributions thereto. One of the provisions of this policy provided that if he died prior to reaching retirement age, he would be entitled only to his contributions and interest thereon. If, on the other hand, he survived the retirement date, his estate or the designated beneficiary would be entitled to the company's contribution in an equal amount plus interest in addition to his own. The expected retirement date was age 65 though provision was made for an earlier retirement at the election of the policyholder. It became evident that Mr. Sugar was seriously ill and unable to continue to perform his duties. This information was known both to him and to the company.

There came a time when a representative of the company sought to ascertain and determine an earlier retirement date by conferring

with him. He was at that time seriously ill and in the hospital. At this point of Mr. Sugar's life, his prime objective seemed to be to live until his 60th birthday, which would have been the 11th of November, 1962. According to his deposition, Mr. Wayne Dorman, the agent in Washington for defendant, sought to persuade Mr. Sugar to accept the date of the conference, which was October 1, 1962, as the date of retirement. This advice was refused by Mr. Sugar, and he selected November 11, 1962, his 60th birthday. Unfortunately, death came first and Mr. Sugar died on the 8th of November, 1962. On these facts it appears that defendant's motion for summary judgment should be granted unless an issue of material fact is interposed.

The issues set forth in plaintiff's 9(h) statement represent conclusions of law rather than issues of fact. The Court, in an effort to reach a just conclusion, carefully questioned counsel for the plaintiff as to whether Mr. Sugar's insistence upon fixing the date of retirement as November 11, 1962, constituted a binding decision for the reason that Mr. Sugar was not only suffering from the ravages of terminal cancer at the time he made the decision, but for the further reason that he had been given narcotic drugs in an effort to ease his suffering. The Court questioned counsel as to whether Mr. Sugar was competent at the time of his decision. Counsel stated that he had been instructed to withdraw that issue from the case by Mr. Sugar's sister, who is the beneficiary under the policy. The wishes of his sister, who has this substantial interest in the case, should not be ignored. Not only did she have, according to the representations of counsel, frequent opportunity to see her brother and converse with him during this period, but in addition thereto, she has the controlling interest in the result of this litigation.

Without this issue, there is no factual dispute between the parties which would justify the Court in finding a material issue of fact, and accordingly, the Court, must, with some regret, grant defendant's motion.

Counsel will prepare an appropriate order.

April 6th, 1966.

/s/ Oliver Gasch
Judge

[Filed April 14, 1966]

ORDER FOR SUMMARY JUDGMENT

Upon consideration of the motion of defendant for summary judgment, the Statement of Material Facts attached thereto, the plaintiff's Statement of Genuine Issues, the Points and Authorities in support of and in opposition to the motion, and of the depositions and affidavits on file, and oral argument having been heard in open court, it is by the Court this 14th day of April, 1966

ORDERED that the defendant's Motion for Summary Judgment be and it hereby is granted.

Submitted by:

Frederick A. Ballard
Attorney for Defendant

Oliver Gasch
Judge

No Objection As To Form:

Stanley Klavan
Attorney for Plaintiff

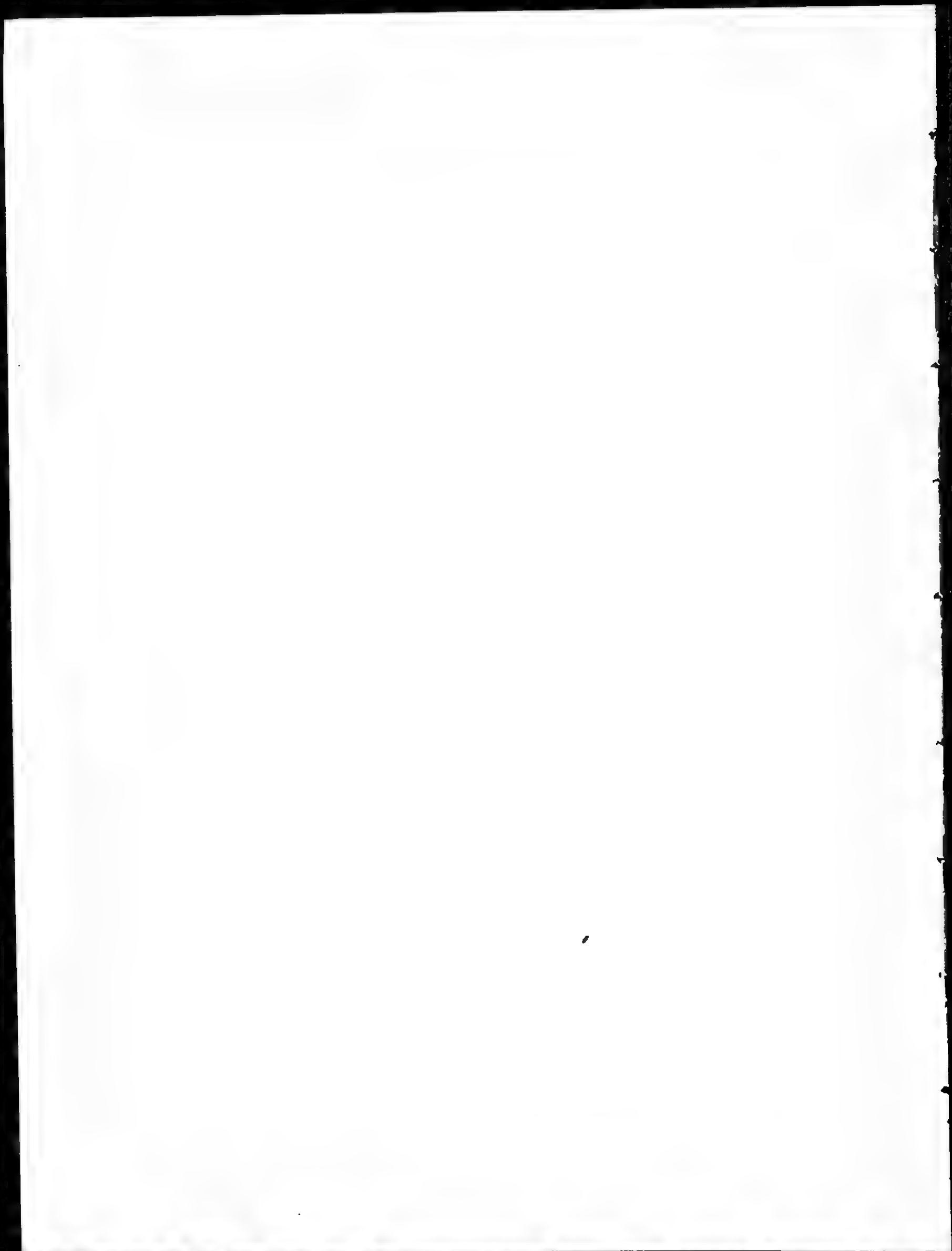
Seen:

Leon M. Shinberg
Attorney for Third Party Defendants

NOTICE OF APPEAL

Notice is hereby given this 6th day of May, 1966, that Edith S. Markus hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of April, 1966 in favor of Penn Mutual Life Insurance Co. against said Edith S. Markus.

/s/ Stanley Klavan
Attorney for Plaintiff



PLAINTIFF'S EXHIBIT NO. 1

MEDICAL DEPARTMENT MEMORANDA

DATE: August 13, 1962

SUBJECT: Samuel J. Sugar - Policy No. 0002

TO BE FILED WITH Claim file

I called Sam Sugar himself concerning what happened, and Sam, incidentally, sounded terrible over the phone, as if he could hardly speak. Sam said that he goes to the Doctor about every 5 weeks to have eye lashes removed from his eyes. The Doctor pulls them out.

I then called Dr. Simpson and he confirmed this. The Doctor stated that Sam is in very poor physical condition and he does not feel that he should do anything more than to try and make him comfortable as he does not have too much longer. He stated that the eye lashes are merely plucked out with tweezers and not cut.

John R. Bowen, M.D.

JOHN R. BOWEN, M.D.
ASSOCIATE MEDICAL DIRECTOR

JRB/dep

Pay as Major Medical
(LKP)
8/13/62

THE PENN MUTUAL LIFE INSURANCE COMPANY

PLAINTIFF'S EXHIBIT NO. 2

STATEMENT OF CLAIM

Group Health Insurance for Agents and Agency Office Employees

Part I—Statement of Claimant

Please fill out and SIGN this portion of the form. For medical expense claims, have your physician complete the reverse side of this form; but if unable to do so, submit itemized bills showing diagnosis, nature, and dates of treatment. For weekly indemnity claims, the reverse side MUST be completed. The General Agent should then complete Part II.

1. Claim is for: ME ☒; MY DEPENDENT ☐. If Dependent, relationship is WIFE ☐; CHILD ☐.

a. For above: PRINT name Samuel J. Sugar Age 59 Sex M

b. If Dependent is employed, give name of employer _____

c. If CHILD: Date of birth _____ Student? Yes _____ No _____ Married? Yes _____ No _____

2. Date illness first began or injury occurred About July 15, 1961 at _____ PM
_____ AM

3. If an injury occurred, how did it happen? _____

a. Did it occur at work? Yes _____ No _____ Employer's name _____

4. Give date of first treatment for the illness or injury July 15, 1961 Doctor's name Dr. Samuel J. N. Sugar

a. Briefly describe this illness or injury Parotid Gland Tumor

5. Date returned to work not yet; OR date of expected return do not know exactly when full work will be resumed

6. Were services of a registered nurse required? Yes ☒ No _____ Name of nurse several

a. Is nurse related to you? Yes _____ No ☒

b. Does she ordinarily reside in your household? Yes _____ No ☒

7. Will a claim for Health benefits be filed with another Company or under any other medical expense plan? Yes ☒ No _____

a. Name of Company Aetna Casualty & Surety Company—very small amount

I represent that the above statements and answers are full, complete, and true and I authorize the release to PENN MUTUAL of any additional information that may be required to establish the validity of this claim.

Date November 27, 1961

CLAIMANT'S Signature Samuel J. Sugar

Part II—Statement of General Agent

After the Claimant and physician statements have been completed, please certify current employment status by filling out and signing this portion of the form.

1. Name of Claimant Samuel J. Sugar

a. Effective date of Claimant's or dependent's coverage _____

2. Was coverage continued on a pro rata paying basis until illness or injury began? Yes ☒ No _____

a. If NO, give date coverage terminated _____

3. Date last worked _____

a. Is illness or injury the result of employment? Yes _____ No ☒

b. Has a claim for Workmen's Compensation been filed? Yes _____ No ☒

c. Date returned to work not yet; OR date of expected return undetermined

4. Is Claimant insured in any other Group Plan for which you pay or contribute toward the cost or make payroll deductions? Yes _____ No ☒

a. If YES, show amount of reimbursement for this illness or injury _____

Date Nov 30, 1961

Signature of General Agent Walter E. Dorman EE

FOR HOME OFFICE USE

POLICY NUMBER	1-D	LAST NAME, FIRST & MIDDLE INITIAL	DEP.	DIS. DATE	TYPE

1/2 En. 2 for id. 5/21/61 - WES.

Wayne E. Dorman Agency

1331 G Street, N. W.

Washington 5, D. C.

Part III—Attending Physician's Statement (Group Insurance)

Dear Doctor:

Please fill out and sign this form and return it to the Policyholder shown above.

1. Patient's name Samuel J. Sugar,2. Nature of sickness or injury (Describe complications, if any) Tumor of LeftParathyroid gland3. Did this sickness or injury arise out of patient's employment? Yes _____ No X

If "Yes," explain _____

4. Is disability due to pregnancy? Yes _____ No X

If "Yes" what was approximate date of commencement of pregnancy _____

5. Date symptoms first appeared or accident occurred about 7/15/616. Date patient first consulted you for this condition 7/15/61

7. Nature of surgical or obstetrical procedures, if any (Describe fully)

Excision of Left Parathyroid gland tumor
Excision of Cervical (Left) lymph node
by Dr. Daniel Collins, N.J. City8. Date performed? October 25, 1961 Charge for this procedure \$ _____9. Where performed Roosevelt Hosp., NY If in hospital, in-patient X Out-patient _____

10. Give dates of treatments at:

Office Oct. 6, 7, 1961 - Home office: July 15, Aug. 5, Sept. 28,October 9, Nov. 16, 1961

Hospital _____

11. What other services, if any, did you provide patient? (Itemize, giving dates and fees)

I-ray of chest (2 views) October 7, 1961 \$15.0012. This patient has been continuously disabled (unable to work) from October 18, 6113. If still disabled, when should patient be able to return to work? Undetermined

14. Remarks _____

Date November 23, 1961SIGNATURE Samuel J. Sugar M.D.Telephone Number Un 4 7887Address 4637 Eastern Avenue, Washington 18, D. C.

PLAINTIFF'S EXHIBIT NO. 3

SUGAR and SUGAR*Insurance*

412 INVESTMENT BUILDING WASHINGTON 8, D.C.

August 2, 1962

MEMORANDUM

Re: Illness of Samuel J. Sugar
Policies 2631398 & 2638336

Group Insurance Claim #11-002466

Operated on for removal of Parotid Gland tumor about October 25, 1961. Gland, 7th cranial nerve, lymph glands, and neck mastoid muscle - plus other items removed. In hospital for about 2½ weeks, then at home for about 3½ weeks before visiting the office. Came into the office for a few hours daily thereafter until around March 1st when trouble developed in left arm and esophagus. Visited orthopedic doctor, physiotherapist doctor, throat doctor, surgeon who did the original operating in New York, and was referred to local cancer man, Dr. T. Crandall Alford. X-Ray pictures indicated tumor cells still present and X-Ray treatments were begun by a Dr. Ralph Caulk to the cervical spine for treatment to the arm that was carried in a sling for a few months. These lasted over one month and then X-Ray treatments began for stricture in the esophagus, after being in the hospital where a chest doctor attempted to get down in the throat but could not do so because of the angle of the left jaw. So, X-Ray treatments to the esophagus began. While these treatments were going on vision in the left eye became affected and Mr. Sugar began seeing double. The eye physician indicated something wrong with the 6th cranial nerve controlling the muscle of the left eye. Naturally, with the left arm and eye affected, Mr. Sugar cannot drive an automobile, and with the esophagus trouble cannot do much talking and cannot accept telephone calls. This has been true since March.

Mr. Sugar's routine is to go for an X-Ray treatment every morning at around 11:A.M., then go to his office where he looks at the mail, then has lunch, then takes a nap, then hangs around the office for another hour or two in order to keep himself from having too much idle time.

Name of Insured <u>Samuel A Sugar</u>		Date of Birth MO. DAY YR.
Present Address NO. <u>3900</u> STREET <u>16</u> CITY <u>WASHINGTON</u> STATE <u>DC</u>	Weight Lbs. <u>135</u>	
ATTENDING PHYSICIAN'S STATEMENT OF DISABILITY The insured is responsible for the completion of this form without expense to the Company. You may mail this form direct to The Penn Mutual Life Insurance Company. Space is available on the reverse if you wish to amplify your answers. It is understood and agreed that the furnishing for use or the retention of this blank, by the Company, when completed shall not operate as a waiver or impairment of any right or defense which the Company has under the policy or policies.		
1. HISTORY		
(a) When did present illness begin, or injury occur?	(a) <u>about July 1, 1961</u>	
(b) Date insured was obliged to cease work?	(b) <u>about Oct 20, 1961</u>	
(c) Is there a previous history of this illness?	(c) <u>no</u>	
2. PRESENT CONDITION		
(a) Subjective Symptoms	(a) <u>Double vision</u>	
(b) Objective Findings	(b) <u>weight loss. Paralysis left 6th cranial nerve</u>	
(c) Give report of X-rays, E.K.G.s., or any other special tests.	(c) <u>Apr 16, 1962 - X-ray = numerous foci in cervical spine (METASTASIS?)</u>	
(d) Is insured	<input type="checkbox"/> Ambulatory? <input type="checkbox"/> Bed Confined? <input checked="" type="checkbox"/> House Confined? <u>Partly</u> <input type="checkbox"/> Hospital Confined?	
3. DIAGNOSIS		
<u>ADENOCARCINOMA LEFT PAROTID GLAND WITH INVASION ADJACENT MUSCLE & LYMPH NODES</u>		
4. TREATMENT		
(a) Date of first visit	(a) <u>JULY 5, 1961</u>	
(b) Date of last visit	(b) <u>JULY 26, 1962</u>	
(c) Frequency of visits	(c) <u>MONTHLY</u>	
(d) When did you last examine the insured?	(d) <u>JULY 26, 1962</u>	
5. PROGRESS		
Recovered	<input type="checkbox"/>	
Improved	<input type="checkbox"/>	
Unimproved	<input checked="" type="checkbox"/>	
Retegressed	<input type="checkbox"/>	
6. DEGREE OF DISABILITY - COMPLETE		
(a) Has the insured been able to do any work, partial or otherwise? <u>NO</u>	REGULAR WORK <u>NONE</u> OTHER WORK Mo. Day Yr. Mo. Day Yr. Mo. Yr. Mo. Yr.	
(b) If not, when do you think he will be able to work?	Approximate Date .. Indefinite <u>X</u> Never	
7. Is the insured mentally competent to endorse checks and direct the use of the proceeds thereof with a clear understanding of the nature of his acts?		
<u>YES</u>		
PLAINTIFF'S EXHIBIT NO. 4		
[Attachment No. 8 to Defendant's Motion for Summary Judgment]		
8. REMARKS:		
PATIENT RECEIVING EXTENSIVE X RAY THERAPY		DATE <u>Aug 11, 1962</u> SIGNED <u>Samuel A Sugar</u> M.D. ADDRESS <u>4637 EASTERN AVE</u> <u>WASHINGTON 18 DC</u>

PLAINTIFF'S EXHIBIT NO. 5

THE PENN. MUTUAL LIFE INSURANCE COMPANY
INTRA-ORGANIZATIONAL CORRESPONDENCE

To: W. Rowland Evans
Group Department

Location: Home Office

From: Delora M. Lawrence, Cashier
Dorman Agency (048)

Location: Washington, D. C.

Subject: Samuel J. Sugar

Date: September 26, 1962

Dear Mr. Evans:

Mr. Dorman asked that I write to you again in reference to the benefits which Mr. Sugar is entitled to under waiver of Premium and income indemnity.

It would be greatly appreciated if you could let us know the Company's action on the above inasmuch as Mr. Sugar is home now and house confined.

Thank you for your assistance in this matter.

Sincerely,

Delora M. Lawrence
(Mrs) Delora M. Lawrence
Cashier

d/

9/27/62 - Advised Mrs. Lawrence we should have some definite word next week.

WES

OK & No. 5 for it - 5/21/65 WES.

INSURED'S STATEMENT OF DISABILITY

It is understood and agreed that the furnishing for use or the retention of this blank, by the Company, when completed shall not operate as a waiver or impairment of any right or defense which the Company has under the policy or policies.

SEE OTHER SIDE FOR INSTRUCTIONS

1. Name <u>SAMUEL J. SUGAR</u>		2. Date of Birth <u>Nov. 11 1902</u>	
3. Present Address <u>3900 - 16th St., N.W. - Wash. 11, D.C.</u>		4. Place of Birth <u>Poland (an U.S. citizen)</u>	
5. Numbers of all policies under which benefits are being claimed <u>2631398 and 2638336</u>			
6. Total amount of insurance on your life, inclusive of accident and health. <u>\$174,000.</u>	COMPANY	AMOUNT	DISABILITY BENEFITS
	<u>Metropolitan Life of N.Y.</u>	<u>15,000.</u>	<u>Living and Death</u>
	<u>Prudential</u>	<u>51,000.</u>	<u>Living and Death</u>
	<u>Continental</u>	<u>83,000.</u>	<u>" " on reserve</u>
Please continue on reverse if necessary (over)			
7. (a) Occupation at time disability was incurred		(a) <u>Insurance Agent</u>	
(b) Name of employer		(b) <u>Self</u>	
(c) Address of employer		(c) <u>Office address - 412 Investment Bldg., Wash. 5, D.C.</u>	
(d) Average monthly earnings		(d) <u>Over \$1,000.</u>	
(e) When did you last work?		(e) <u>Really haven't worked since the first of October 1961</u>	
8. Nature and cause of disability		<u>Parotid gland tumor - left side of face.</u>	
9. (a) Are you now totally disabled?		(a) <u>Yes</u>	
(b) Since what date have you been so disabled?		(b) <u>from Oct. 25, 1961 or March 1, 1962 - depending on interpretation</u>	
(c) When do you expect to resume work part-time or otherwise?		(c) <u>Dont know - can't talk with division re. back</u>	
10. (a) Were you ever a member of the armed forces?		(a) <u>No</u>	
(b) If so, please state date of induction		(b) _____	
" " " " date of discharge		_____	
" " " " branch of service		_____	
(c) Have you ever filed claim against the veterans administration?		(c) _____	
11. Physicians now in attendance		NAME ADDRESS	
		<u>Dr. J. H. Sugar - 4637 Eastern Ave. - Wash. 18, D.C.</u>	
		<u>Dr. J. Greenfield - 2300 K St., NW - Wash., D.C.</u>	
12. Physicians consulted for this or any other injury or illness during the last 5 years.		NAME ADDRESS CAUSE	
<u>For others - see Group Claim # 11-002466</u>		<u>Dr. Daniel Catlin - 655 Park Ave - N.Y., N.Y.</u>	
		<u>Dr. Ralph Corlie - 110 Irving St., NW - Wash., D.C.</u>	
13. Have you received any hospital or dispensary treatment? <u>Yes</u>		INSTITUTION LOCATION DATES	
<u>See your Group Claim File</u>		<u>Reconalt Hospital - N.Y. City - Oct. 25, 1961 - Nov. 1, 1961</u>	
		<u>George Washington - Wash., D.C. - Jan 21-23, 1962</u>	
14. REMARKS		DATE <u>August 13, 1962</u>	
		SIGNED <u>Samuel J. Sugar</u>	
		ADDRESS <u>3900 - 16th St., NW - Wash. 11, D.C.</u>	

Washington, D. C.,
Friday, March 18, 1966

[2]

PROCEEDINGS

THE CLERK: Markus versus Penn Mutual Life Insurance Company.

MR. BALLARD: May it please the Court, Your Honor, this is a motion for summary judgment on behalf of the Penn Mutual Life Insurance Company in a case brought by the beneficiary designated by an agent of the Penn Mutual Life Insurance Company under the Penn Mutual's retirement plan for its own agents, whereunder the beneficiary, who is the agent's sister, contends that she should in some way be entitled to the benefits which she would have been entitled to had he designated a different retirement date than he actually did designate.

The file, the papers are fairly lengthy. But I assure Your Honor that the length does not reflect any complexity in the issue, as I shall endeavor to demonstrate, simply by reference to the statement of material facts, and the statement of genuine issues filed in response thereto by the plaintiff.

The situation is briefly this, Your Honor: Mr. Sam Sugar had been an agent of the Penn Mutual since 1931 and was, like their other agents protected by their retirement plan for their own people. He was one of their star agents. [3] He was a pioneer in many areas of life insurance, including the particular area in which we are concerned here, namely, retirement plans. He knew more about them than most anybody in the country. His son, Marvin Sugar, whose deposition has been taken, is following in his footsteps and as the record shows is also an expert on retirement plans. They practiced insurance brokerage and agency together.

In 1961, Mr. Sam's health began to deteriorate, and in October of that year he was operated on for cancer, specifically, a parotid gland

tumor. And it was hoped for a time that his condition would improve as a result of the surgery but it did not. And around the spring or summer of 1962, it became apparent to the company — who this record shows were more interested in Sam Sugar than anybody else — that he should be given consideration to early retirement, unless he were doing so on his own hook, so to speak. And so Mr. Wayne Dorman, who is the company's general agent in the District of Columbia, had a telephone call from Philadelphia, from the main office, from one of the officers up there suggesting the subject of early retirement be suggested to Mr. Sam by the company.

And the retirement date, Your Honor, is critical under the retirement plan, as it is in all retirement plans. Mr. Sam would have retired on his 65th birthday in normal [4] course of events, which would have been 1967. He had under the plan the privilege, as everyone did, of designating an early retirement under certain circumstances. If an agent lives under the plan until his designated retirement date, then if the agent has designated a beneficiary of his interest under the plan, the beneficiary takes that entire interest, which includes, in that case, the agent's own contributions with interest, plus a sort of matching contribution by the company. If, however, he does not survive until his designated retirement date, then the plan provides for a refund to his estate of his own contributions only, with of course accrued interest.

Now, as I have said, in the middle of the summer, along the middle of 1962, Wayne Dorman, at the company's suggestion, broached the subject of early retirement to Sam Sugar because of this situation. And Sam Sugar said he would accept the suggestion and would like to designate as an early retirement date his 60th birthday, which occurred on November 11, 1962.

On Wayne Dorman's deposition he was asked by Mr. Bress, who took the deposition, various questions about the conversation and Mr. Dorman says I urged him, I urged him to do it on the date when the various papers were being signed by him, to exercise this election,

namely, it would have been [5] October 1, 1962. But he simply refused to accept that suggestion. He was determined that he would designate and stick by the designation of his 60th birthday of November 11.

So on October 1, at his request, Wayne Dorman brought him the necessary papers. The governing papers are attached to my motion. They were identified on the depositions and copies are attached to the motion for convenience of the Court. And they will show that he signed the proper papers which would designate his sister as his beneficiary, and November 11 as his retirement date.

Now, unfortunately, he died on November 8, three days before his designated retirement date. Under those conditions, there is simply nothing whatever in the plan, there is no way the company can do anything other than what it did, which was to follow the plan and refund his own contributions with accrued interest to his estate. His estate is represented here today by Mr. Shinberg.

Now, on those facts, what is the theory of the plaintiff's action? I have difficulty in stating it. I am sure my extremely capable opponent, Mr. Klavan, can state a theory. But I have difficulty in stating it. As best I can state it is that plaintiff says that the company in some way should have forced Sam Sugar to designate an earlier date.

[6] THE COURT: What about his competency to make a decision?

MR. BALLARD: Your Honor, there is nothing whatsoever in the record at any point to suggest he was irrational. He was in great pain.

THE COURT: Probably had narcotics in his system.

MR. BALLARD: He was under sedation. He was in pain. He had a short time to live, which he knew only too well. I can show Your Honor various references in the deposition to the fact, which is disputed I understand for some reason by Mr. Klavan, but the record is clear that he knew exactly what he had.

We must bear in mind, Your Honor, that we are dealing here with a man who is an expert in this field, who has dealt all his life with life

expectancy and with all this whole area. And there is not one reference in the record at any point to the fact that he was not completely rational

THE COURT: Mr. Ballard, I can understand your difficulty with the matter that you have to present to the Court, knowing you as I do. But all of us have had experience with persons who have been similarly situated. I recall one case of an eminent physician at Johns Hopkins, who was one of their experts on cancer. He himself was suffering from cancer. [7] He just couldn't bring himself to realize that he wouldn't be able to be there. But he didn't. And he died, just as his doctors told him he would. We didn't have a situation like this, which taxes the imagination and sympathy of people who have to deal with it. I make this observation because through my father I was very familiar with the facts and circumstances of that case, and with my father I went to Johns Hopkins to see Dr. George Walker when he was dying. Eminent physicians at Johns Hopkins mentioned to my father and me that this was not an unusual situation.

Now, Mr. Sugar wasn't an eminent physician. Mr. Sugar wasn't an expert on cancer. But I do feel that under the circumstances, with the sedation, that there is an issue here as to his election. Perhaps I am drawing facts out of the air. But I will hear Mr. Klavan on that, because if I find an issue of fact, of course I should not grant summary judgment.

MR. BALLARD: Your Honor, what legal, what conceivable legal duty would there be, if we went all the way with the hypothesis which Your Honor is now elucidating? There would be no conceivable legal duty on the company to do anything more than it has done. It has gone far beyond the call of duty already.

[8] THE COURT: Of course the company has paid his contributions plus interest.

MR. BALLARD: I don't mean in that sense, Your Honor. The company went far beyond the call of duty in raising this subject originally with Mr. Sugar.

THE COURT: I am sure the company wanted to be fair with him.

MR. BALLARD: I am sure you will get that impression very indelibly from the record, Your Honor. There is no conceivable legal duty, I earnestly submit, even on the hypothesis which Your Honor is suggesting. What could they have done? They couldn't force Mr. Sugar to designate a date other than the one he insisted. And his son identified this letter that Mr. Marvin Sugar wrote to the company, explaining why he had not only designated November 11, but insisted on it.

Your Honor, that letter is attached to the papers that you have.

THE COURT: People faced with this type of terminal illness are not always rational in their decisions. They frequently are quite irrational in their decisions.

I would like to hear what Mr. Klavan has to say about issues of material fact. If I find them, I will deny your motion. If I don't find one, I will grant your motion.

[9] MR. KLAVAN: Your Honor, if I might, apropos to the discussion between Your Honor and Mr. Ballard, refer to Exhibit No. 4, which is attached to Mr. Ballard's motion for summary judgment. It is an attending physician's statement of disability, which Mr. Sugar filed in connection with certain life insurance he had with Penn Mutual. You see, Penn Mutual maintained a complete medical staff at Philadelphia. They weren't just an ordinary beer company or some company like that. They were a company that was engaged in writing life insurance and in passing on the actuarial possibilities of individuals.

Now, apropos to what Your Honor said, in question No. 5, under "Progress," it has four categories: Recovered, Improved, Unimproved, Retrogressed.

Then, under No. 6, it has "Degree of Disability." Under (a), it says: Has the insured been able to do any work, partial or otherwise? No. (b) If not, when do you think he will be able to work?

And the doctor says it is indefinite, that he is completely disabled.

Now, if Your Honor please, our point is exactly this: Samuel Sugar

was a successful real estate agent and [10] broker; probably one of the top in the District of Columbia. No question about it. In July of '61 he took sick. His diagnosis was cancer. By October of '61 after he was operated on, the left side of his face looked like it was cut in half. I knew Samuel Sugar. I observed it. I will prove it, that is what he looked like. I will prove further that this cancer had spread throughout his body; that he had his esophagus affected; that he was paralyzed; that he was in such condition that he couldn't take eyelashes out of his eyes; that Wayne Dorman, the man Mr. Ballard refers to, who approached Mr. Sugar about retirement, gave him a reading stand so that he could prop his arm up on the reading stand and read, he was in that much pain.

I say, though, Your Honor, that the big point in this case is, as Your Honor mentioned, that nobody, Mr. Sugar included, is going to admit that he is going to die. Mr. Sugar, a hard-nosed businessman, who had made a lot of money, is certainly not, if he knows all the facts, going to risk \$16,000 because as his son, who is in his twenties or very early thirties, says, "I am sure my father wanted to live to his 60th birthday." But I say to the Court that Mr. Sugar did not know all the facts.

You had two parties dealing here who were unequal. [11] You had the Penn Mutual with a complete medical staff, who had gotten medical reports on Samuel Sugar. And apropos to that, Your Honor, in August '62, Doctor Bowen, from the Penn Mutual, spoke to Mr. Sugar, and he wrote a memo. He says, Sam Sugar can hardly speak. He sounded terrible. Eye lashes are falling in his eyes, he can't take them out.

This was two months before the election. Doctor Bowen thought enough of the seriousness of this to call Sam Sugar's doctor who told Doctor Bowen, who works for the company, all we can do is make Sam Sugar comfortable.

Nowhere in this record does it appear that Wayne Dorman or anyone else told Samuel Sugar, Look, Sam, you are going to die. You could die today, you could die tomorrow. Of course they didn't tell him that. It would be cruel and inhumane to tell him that.

But when they embarked on this course, which was a noble course—and I will admit, Your Honor, when they took it on themselves to suggest voluntary retirement I say that they did something that was a noble act as far as if we want to designate things of a financial nature as being noble, but it was nice on their part. There was no necessity at that stage to do it. But once they set those wheels rolling, and once they went to Samuel Sugar with the uneven stake of [12] intelligence between the two, the unequal knowledge, they had a duty to say, Sam, you retire. Do you want to retire? You retire right now. They didn't have to even go that far. They could have just made sure he wanted to retire and retired him forthwith. The mechanics, I believe, Your Honor, are really not material here. I think they had a duty, once they acted, with their superior knowledge, to either do something which would be almost inhumane in telling him he could die momentarily or to retire him forthwith.

What they are trying to do is they are trying to say — well, I think they thought he would make it for the few remaining days. He didn't make it. It is incomprehensible to me that they would now be trying to justify their position. It is incomprehensible that they would try to say that Samuel Sugar knew that he was gambling \$16,000 on living for thirty days.

And what was the difference to Penn Mutual? Pennies, as of the time of the election. Once Sam Sugar made his October payment of fifty-odd dollars, they had nothing to lose. There was no risk at all to Penn Mutual. All they had was something to gain.

Now we feel, Your Honor, we can show all of this. We feel that we can show his life expectancy, Samuel Sugar's [13] life expectancy on October 1 was almost nil, if not nil. We believe we can show the Court that he could have died at any time as of October 1. Could have died on October 1.

We think we can show you that he did not know that his life expectancy was as it was; that no one had told him.

THE COURT: Did the company have any opportunity under contract to fix a date, or was that something solely in the election of Mr. Sugar?

MR. KLAVAN: No, Your Honor, I think they could have made the date forthwith as long as he retired. I don't think they had to ask him for a date.

I have been told by my client, Mrs. Markus — and she is in the courtroom, without my invitation — that I cannot represent to the Court that Samuel Sugar was at any time incompetent. I will not say that he was incompetent. I will not say that Samuel Sugar at any time was afflicted mentally in any way, except — I will not say he was mentally incompetent. I have been instructed by my client not to say it. I do say, however, that Samuel Sugar unfortunately was not dealing at arms length with the insurance company. They knew things that he didn't know. They didn't tell him. Even if it was a humane withholding of information, they still withheld it.

THE COURT: What are the issues of material fact [14] on which you rely?

MR. KLAVAN: I rely on the eight issues, Your Honor, which are in our statement of genuine issues.

THE COURT: I have them before me, and which would you like to emphasize?

MR. KLAVAN: Your Honor, I have to emphasize all eight of them. I think every one of them are valid.

THE COURT: Which is your best one?

MR. KLAVAN: I believe that my best one — well, it would be a combination of No. 6, 7 and 8, based on the fact that the information available to the two sides was unequal and that the company stood in a superior position to Mr. Sugar; backed up by No. 1, which I believe the facts will come out that Mr. Sugar had no life expectancy as of October 1.

THE COURT: All right. Is there anything else?

MR. KLAVAN: That is all, Your Honor. I think it sets out for purposes of summary judgment sufficient material facts.

THE COURT: Mr. Shinberg, you haven't said anything. I will be very happy to hear from you. And of course, Mr. Ballard, you have the last word.

MR. SHINBERG: If it please the Court, I think that, as counsel for the estate, there is really nothing that I can say to the Court that would be of any assistance.

[15] The position of the estate is necessarily a neutral one, as reflected in our answer to the third-party complaint. We are third-party defendants here. The Penn Mutual Life Insurance Company paid to Sam Sugar's estate the amount of his contribution plus accrued interest under the theory of the retirement plan agreement, as they construed it. And of course the estate received and accepted this payment.

Our only position other than this is that we are to a certain extent an involuntary party to this action and the estate has been put to some expense in connection with this litigation. This is not of great importance. I merely mention it to the Court.

The other aspect of the estate's position does not concern itself with the merits of the case, either on the issues if they go to trial or on the motion for summary judgment as presented and argued to Your Honor this morning.

But with respect to the time for the settlement of the estate itself, the estate posed no unusual problems, and perhaps could not have been settled within the normal period of administration of a year, but I would say not more than two years would be required, including the audit of the Federal estate taxes and so forth, all of which has now been completed, and it would be my suggestion that if Your Honor for his own [16] good reasons would see fit not to grant the summary judgment, that Your Honor consider our request in the alternative for an advance date of trial, so that we can have this disposed of. We cannot settle the estate. There is no way that the estate can be settled until this litiga-

tion has been completed. We cannot even deposit the money into the registry of the Court because this will not help us to settle the estate.

THE COURT: Mr. Shinberg, with reference to your alternate request, the Chief Judge must pass on the issue of advancement. That is his function.

MR. SHINBERG: It would follow. I merely mention it because I think I owe it to the Court to make our position known, but I don't mention it as a part of this hearing nor for it to have any influence or effect on the matter before Your Honor this morning.

THE COURT: All right.

Mr. Ballard.

MR. BALLARD: First, Your Honor, as to the statement made by Mr. Klavan that the parties had unequal knowledge, I refer only to the plaintiff's own deposition at page 9, where she stated:

"At first it was diagnosed in July of 1961 as Bell's palsy. It became increasingly worse, I believe, [17] to the best of my recollection, in early October. It was finally diagnosed as a cancer of the parotid gland."

"Question: What did Mr. Sugar tell you as to how long he expected to live?

"Answer: He never did.

"Question: That was never discussed?

"Answer: Never.

"Question: With respect to the diagnoses that you have just mentioned, he was aware of those?

"Answer: Yes."

The memorandum which is attached, dated August 2nd, to the motions papers, and which he forwarded to Wayne Dorman to be sent on to the company in connection with his claim for total disability, shows only too clearly how well he knew the seriousness of his condition.

There is utterly nothing in this point that there was unequal knowledge between these parties.

Second, Mr. Klavan states that the company somehow, some way now has a duty, a legal duty, to designate for Sam Sugar a date for his retirement which is different from the date that he designated and insisted upon. There is utterly no way that the company could do it. It would be violating a [18] duty if it did so.

May I call Your Honor's attention to the form in this respect, which is Attachment 3 to my motion, which is entitled 'Exercise of Privileges.'

'I exercise the privilege extended to me by the Agents' Retirement Plan to retire prior to my normal retirement date. The date elected by me is November 11, 1962.'

And of course that is in accordance with the terms of the plan, that the agent must do the designating. There is no way the company could designate a different date for him.

Finally, Your Honor, Mr. Klavan states, as I understood him, and he will correct me if I am in error, that he relies primarily on this motion on Item 6, 7 and 8 of his statement of genuine issues. Now 6, 7 and 8 are not issues of fact at all. They are legal questions. And that is why I am asking Your Honor to pass on this question. There is nothing before anybody except legal questions, as to whether there is any conceivable showing of a legal duty on the Penn Mutual to do something which it was legally unable to do.

There is no reason to leave this case, Your Honor, to a jury to express its sympathy because of this very unfortunate three-day discrepancy. It is a classic case which [19] should be decided by the Court.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Ballard.

I am going to look your papers over again.

MR. BALLARD: Thank you.

THE COURT: Thank you.

MR. KLAVAN: Thank you, Your Honor.

(Thereupon, at 10:42 a.m., the hearing was concluded.)

DEPOSITION OF MARVIN L. SUGAR

[Washington, D.C., Tuesday, January 7, 1964]

* * *

[3]

DIRECT EXAMINATION

BY MR. BALLARD:

Q. Mr. Sugar, would you state your full name for the record, please, along with your address? A. Which address?

Q. Home and office. A. Marvin L. Sugar, 9405 Corsica Drive, Bethesda, Maryland; office, 1511 K Street, Northwest.

Q. What is your occupation? A. I am in the insurance business.

* * *

Q. How old are you? A. Thirty-one.

Q. How long have you been in the insurance business? A. Since 1956.

Q. What was your relationship to the late Mr. Samuel Sugar? A. He was my father.

* * *

[4] Q. When you entered into the insurance business, is that originally with your association with your father? A. Yes. That is correct.

* * *

[19] Q. And how about the retirement plan, did he discuss what his status was under that with you? A. Never; never with me.

Q. Never discussed it with you at any time? A. He did not discuss his insurance involvement in the retirement plan with me.

* * *

[21] Q. I wonder if you would identify some of these documents

for me, please. I show you, Mr. Sugar, a form entitled "Insured's Statement of Disability" and ask you if this is your father's signature at the bottom where it purports to be signed by him under date of August 13, 1962? A. Yes.

MR. BALLARD: May this be marked for identification as Defendant's Exhibit No. 1?

(The document referred to was marked for identification as Defendant's Exhibit No. 1.)

BY MR. BALLARD:

Q. I show you a document entitled "Exercise of Privileges" signed by Samuel J. Sugar, October 1, 1962. [22] A. Yes; that is his signature.

MR. BALLARD: May that be marked Defendant's Exhibit No. 2 for identification?

(The document referred to was marked for identification as Defendant's Exhibit No. 2.)

BY MR. BALLARD:

Q. Next I show you a document entitled "Election of Annuity" signed by your father on October 1, 1962, and ask if that is his signature? A. Yes, that appears to be his signature.

MR. BALLARD: May we have this marked Defendant's Exhibit No. 3 for identification?

(The document referred to was marked for identification as Defendant's Exhibit No. 3.)

BY MR. BALLARD:

Q. Next I show you a typewritten document, dated August 2, 1962, entitled "Memorandum — Re Illness of Samuel J. Sugar" and so forth, which is attached a handwritten memorandum purported to be in his handwriting and signed "Sam". Is that his handwriting? A. Yes, that is his signature.

MR. SHINBERG: Either now or when you are all through, Mr. Bal-

lard, I will have to put something on the [23] record with respect to this exhibit.

MR. BALLARD: Go right ahead. That would be Defendant's Exhibit 4 for identification.

(The document referred to was marked for identification as Defendant's Exhibit No. 4.)

MR. SHINBERG: For the record, I wish to note, on behalf of the third party defendants, that the memorandum to which counsel has referred as being in the handwriting of the decedent and signed with his first name and no reference is made to the paper attached thereto, which could identify this paper; consequently, the right is reserved, if it should become essential or in any way material to the case at a subsequent time, to require specific proof that this paper, which is attached to this memorandum, was in fact attached to it at the time the memorandum was signed.

BY MR. BALLARD:

Q. I might ask the witness if he can identify this typewritten memorandum. Were you present when this was made? A. No.

Q. You never saw it before, is that right? A. No; I never saw it before.

* * *

[31] Q. Did you discuss with your father the prognosis of his illness? You know what I mean, I am sure, by prognosis? A. I think I do, but I would appreciate if you would maybe —

Q. Did you discuss with him how very serious his condition was? [32] A. Well, I think I can answer this question for you by saying that I, at all times, steered from any way mentioning to him how serious his problem was.

Q. In other words, you knew?

* * *

A. Yes. I found out the problem. I found out from either Dr. Kaplan, — yes, yes, it was Dr. Kaplan, I believe.

Q. Was it about the time of the operation in New York? A. Immediately after the operation.

Q. When was that, do you remember? A. I don't recall the date of the operation, but it would have been certainly immediately after the operation was completed.

Q. Did Dr. Kaplan tell your father the same thing he told you in your presence? A. Oh, no. My father was in the recovery room at the time. That is why I sought out Dr. Kaplan.

* * *

[33] Q. What did your father tell you about how long he expected to live? A. My father never made mention of any expectancy throughout the entire time of his illness to me.

Q. Were you present at any discussions with his doctors when this subject came up? A. As best I recall, and I did say I did accompany him to many visits to his doctors, this subject never came up.

* * *

[54]

CROSS EXAMINATION

BY MR. WOOD:

* * *

Q. I believe your father was operated on in New York in October 1961. Did you go to New York at that time? A. Yes, I did.

Q. And at that time you discussed the operation and the doctor's prognosis with the doctor, is that correct? A. With the doctor?

Q. Yes. A. Yes. As I indicated previously, subsequent to the operation I did meet with the doctor.

Q. That is while your father was still in the hospital in October of 1961? [55] A. Yes, that is correct.

Q. And which doctor or doctors did you discuss that with? A. Dr. Kaplan.

Q. And did he tell you at that time whether or not the operation was successful? A. Subsequent to the operation, when I first met with

Dr. Kaplan, and to the best of my recollection at that time, as I have indicated previously, he told me that his best estimate, and he indicated also this was just an estimate, was that my father had six months to a year to live, but, as I remember, he qualified that by saying he didn't like to make such estimates, and he certainly couldn't verify the accuracy, you know, as to what he said, but I do recall that he gave me this estimate.

* * *

[61] Q. Were you present in or at the time he was in the hospital in Washington which was George Washington University Hospital? He was there for various treatments, is that correct? A. Yes.

Q. Now, but then there did come a time when he did go into the hospital and was there for a matter of days? A. Which hospital is that, George Washington?

Q. Yes. A. I recall that he was, yes.

Q. That was several months before his death, was it not? [62] A. I don't want to comment on when it was.

Q. And you were in the hospital on various occasions when he was in the hospital? A. Yes.

Q. And you were present when some of the doctors came in the room? A. From time to time I am certain I was.

Q. Now, is it not a fact that from the conversations which you heard there between the physicians and your father that they endeavored to give him hope; that he was getting better; improving? A. My answer to that would be I feel that the physicians that handled him attempted as best they could to give him hope, but I would not necessarily answer in the affirmative for the rest of your question.

* * *

[68] Q. After your father returned from New York and had the operation there, did Mr. Wayne Dorman visit your father frequently? A. He visited my father, I am quite certain.

Q. Did he visit him in his apartment? A. I am quite certain that he came by on certain occasions when my Dad was at home.

[69] Q. Were you present on any of those occasions? A. I think I was on one occasion because Wayne Dorman brought something to the house that Father could use.

Q. Now, could you tell us when that was? A. Not other than it was sometime in 1962, no.

Q. What did he bring your father? A. He brought my father something that became very useful to my Dad for reading purposes, a reading stand that his father had had, like a musician's stand, which my father was able to utilize for reading, putting the book up on it, but I don't recall exactly when that happened.

* * *

[78] Q. I don't wish to repeat, but I want to be sure I asked this question. In October of 1962 you were aware of the imminence of your father's death, is that correct? A. I have indicated previously I don't use the term "aware" that you repeatedly use, but to the best of my recollection I had a definite feeling when he entered the hospital for the last time, judging from his appearance, I had a feeling [79] that his longevity or expectancy was not too much longer. I did not indicate a time.

Q. At that time, from your conversations with your father, do you believe that your father was aware of the imminence of his death? A. Mr. Wood, I never knew what my father's thoughts of thinking were or was relative to this question, so I would have to answer that, I do not know what his thinking was.

Q. For the purpose of the record, then, I would like to ask you this further question. In October, the first part of October, at the time which your father chose this option which has been introduced for identification, was he, to your knowledge, aware at that time of the imminence of his death? A. I don't know.

* * *

DEPOSITION OF EDITH S. MARKUS

[Washington, D.C., Monday, February 3, 1964]

[3]

DIRECT EXAMINATION

BY MR. BALLARD:

Q. State your full name and address, please. A. Edith Sugar Markus, 825 Juniper Street, Northwest, Apartment 103.

Q. What was your relationship to Mr. Samuel Sugar? A. Sister.

* * *

[4] Q. In 1961 where did Mr. Sugar live? A. Crestwood Apartments, 16th and Shepherd Streets.

Q. Did he live alone at that time? A. Yes.

Q. Approximately when did he become ill? May I say in connection with this question and any other questions, unless I specifically ask you, I am not seeking to ask you for a specific date, but just the best of your recollection. A. The question needs clarification. The first manifestation of anything wrong with him was in June or July.

Q. 1961? A. 1961.

Q. At that time he was living in the Crestwood Apartments? A. Yes.

Q. Did he continue to live there alone until he died? A. No.

Q. I mean apart from going to hospitals. A. No.

Q. Did you go there to live at any time? A. Not to live.

[5] Q. Did anyone live with him? A. Yes.

Q. Who? A. A practical nurse. He had a housekeeper.

* * *

Q. The practical nurse went there to live at one point. Is that correct? A. Yes.

Q. Who is she? A. I don't recall her name.

Q. What was the housekeeper's name? A. Iona Rudasill.

Q. Did the same practical nurse continue to live there until he

died? A. Until he went on his last visit to the hospital, and she stayed on at the hospital with him for three or four days.

Q. You don't recall her name at the present time? A. I can find it out.

Q. Beginning with the summer of 1961, how much were you with him thereafter? [6] A. Would you clarify that?

Q. You have stated that you did not at any time go to live there, but you did, I believe, look after him a good deal during his last illness. Is that correct? A. Yes.

Q. Approximately how much time did you spend there with him? A. At what period?

Q. Beginning in the summer of 1961, from then on? A. From August, 1962, until his death, I was there almost constantly. Prior to that I was there quite a great deal.

Q. Did you look in on him almost every day?

MR. BRESS: During what period?

MR. BALLARD: During the period between the summer of 1961 and the summer of 1962.

THE WITNESS: We saw him frequently, as was our habit. During the time of his hospitalization, I was there with him in October for the entire time he was in Roosevelt Hospital at New York.

BY MR. BALLARD:

Q. That would have been October, 1961. Is that right? A. October, 1961. When he returned from the hospital, I was there with him every day for approximately two to three weeks.

[7] Thereafter, I had dinner with him approximately two to three times a week. From March on, my visits became more frequent, and from the end of July, as I stated before, I was there most of the time.

* * *

[8] Q. Mrs. Markus, what did Mr. Sugar tell you as to the nature of his illness during the period we are discussing? A. What period?

Q. Beginning with what turned out to be his last illness, approxi-

mately I believe you stated in the summer of 1961. A. You have to clarify that.

Q. During the period that you have been testifying [9] about, that is, beginning with July or August of 1961, and continuing until his death, during this period when you spent so much time with him, what did he tell you as to the nature of his illness? A. It is a broad question. It would encompass a whole medical record.

Q. Do the best you can, please. A. At first it was diagnosed in July of 1961 as Bell's Palsy. It became increasingly worse, I believe, to the best of my recollection, in early October. It was finally diagnosed as cancer of the parotid gland. Will you ask me some more questions?

Q. Yes. What did Mr. Sugar tell you as to how long he expected to live? A. He never did.

Q. That was never discussed? A. Never.

Q. With respect to the diagnoses that you have just mentioned, he was aware of those? A. Yes.

* * *

[12] Q. Were you present at any time when any of the doctors discussed with Mr. Sam Sugar what was the matter with him, what was the nature of his illness, what ailed him? A. If you mean using the word "cancer" directly, to the best of my recollection, in my presence none of the doctors ever — that is, in my presence — discussed cancer per se. They discussed the marked progression of his illness. If his neck ached, they discussed that. If his arm hurt, they discussed that, and so forth.

Q. So you were present during certain discussions between Mr. Sugar and some of the doctors. Is that correct? A. I wouldn't call it a discussion.

Q. You tell me what you would call it. A. The usual doctor-patient visit. 'How do you feel today? Let me look at your neck. Is it badly burned? Let me see your eyes. Are you still having double vision? Things of that sort.

* * *

[13] A. Do you mean in my presence, in Mr. Sugar's presence, and in the doctor's presence?

Q. That is right. A. Rarely. Let me correct that statement. I didn't understand you. If you are saying did I ever discuss Mr. Sugar's condition in the presence of Dr. Alford, the answer is "No." I never discussed Mr. Sugar's condition in the presence of these doctors. When it was necessary for me to tell Dr. Samuel Sugar that Sam had been vomiting for hours and was dehydrated or something, that is the type of discussion I had.

MR. BRESS: When you say that you didn't discuss this matter in the presence of the doctors, you mean in Sam's presence? Is that what you mean?

THE WITNESS: Yes.

* * *

[14] BY MR. BALLARD:

Q. Am I correct, that you were trying to give me, as best you could recall, the occasions you had been present when there had been discussions between Mr. Sam and some of his doctors? A. Your word "discussion" is very ambiguous.

Q. Conversations.

MR. BRESS: I thought the last question which the witness was answering about conversations with doctors was not related to conversations in the presence of Sam, but conversations she had with the doctors about Sam. That was my understanding of the last question.

[15] BY MR. BALLARD:

Q. Is that your understanding? A. That was my understanding.

Q. This is probably my fault, then. My last question was intended to ask you about occasions when you had been present at conversations between Mr. Sam and any of his doctors. A. There would have been some occasions, like when Dr. Alford came to the hospital to see him. He would say, "How do you feel today? Let me look at you." I do not

consider that a discussion. During that type of discussion I was present.

Q. You mentioned Dr. Sam Sugar in this connection and Dr. Alford. A. Yes.

Q. I believe you said you didn't recall at this time any others. Is that correct? A. In Mr. Samuel Sugar's presence?

Q. Yes. A. In New York at the hospital, when Dr. Kaplan came to see him, I was in the room on occasion when Dr. Kaplan examined him. I do not call this a discussion, however.

Q. Does that complete your answer to that question? [16] A. I think so, if I understood your question.

Q. At any of these occasions, did any of the doctors, in your presence, discuss with him how long they expected him to live? A. No.

Q. Did he ask them? A. I don't recall ever hearing him ask them.

* * *

[18] Q. Would you continue and tell us what else you recall, please? A. Social conversation. Mr. Sugar was finding it difficult to hold a book to read because of his bad eye. Mr. Dorman graciously and kindly offered to bring Mr. Sugar a little antique reading table to make it easier for him, which he did, and things of a general nature.

* * *

[19] Q. In any of the conversations where you were present, between Mr. Sam and Mr. Dorman, do you recall any conversation with respect to the nature of his illness or what was the matter with him?

* * *

THE WITNESS: I would say that it was the usual social type of conversation of 'How are you feeling today, Sam?' Sam's answer would be, 'Well, this is giving me hell,' or 'That is giving me hell,' or something like that. I don't think it was a deep, penetrating conversation.

* * *

Q. I think you do. [20] Was there any discussion at any of these

occasions in your presence as to how long Mr. Sam expected to live?

A. No.

* * *

DEPOSITION OF WAYNE E. DORMAN

[Washington, D.C., Monday, February 3, 1964]

[3] DIRECT EXAMINATION

BY MR. BRESS:

Q. State your name and occupation. A. Wayne E. Dorman, General Agent for the Penn Mutual Life Insurance Company.

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[4]

Q. Are you the top representative of the Penn Mutual for this area?

A. Yes, sir. I have the franchise for the Penn Mutual in this area.

* * *

[5] Q. Are the salesmen and other representatives in this area for Penn Mutual under your supervision? A. They have contracts with me, sir.

Q. Therefore, they are under your supervision? A. I guess to that extent they are.

Q. Do they get compensation from you? A. Yes, sir.

* * *

[7] Q. You transmit, as the Agent of Penn Mutual, their [8] plan to your sub-agents? A. Transmit?

Q. You communicate that plan? A. Yes, sir.

Q. In that communication to them, you are acting on behalf of Penn Mutual. Is that correct. A. I guess that would be acting — that is correct.

Q. When did you first become acquainted with Sam Sugar? A. I would say when I first came with the company in December of 1953.

Q. According to your records, do you know how long he had already been an agent for this company? A. Yes, sir.

Q. How long? A. I believe it is July, 1931.

Q. Do you have in your business some selected group of successful salesmen who sell about \$1 million or more a year? A. There is an organization called The Million-Dollar Round Table, of people who sell a million dollars' worth of business a year. My own company has what we call "Production Clubs," that agents who do a certain volume of business can qualify to be members of.

Q. Do you know whether Sam Sugar was a member of those clubs? A. He was a member of the Million-Dollar Round Table, [9] to the best of my knowledge, for the last ten years of his life. I am sure he was a member of the Penn Mutual Clubs, although not in the last couple of years.

Q. Eligibility in those depends on whether you sell \$1 million or more a year of life insurance? A. Our Club requirement has changed over the years. It used to be a quarter of a million dollars. Since I have been with the company, it went from \$400,000 to \$500,000 and finally to a million, plus other requirements. Up to the time it went to \$1 million, I know that Mr. Sam Sugar was a member. In the last couple of years he did not, to my knowledge, ever place \$1 million with Penn Mutual, so he wasn't a member of our top club.

Q. He had his own office? A. Yes.

Q. He didn't work in your office? A. That is correct.

Q. He sold insurance for other companies as well? A. To my knowledge, yes, sir.

Q. He was in the general insurance business? A. Yes, sir.

* * *

[10] Q. From the time you first met Sam Sugar until he became ill, what was the nature of your personal relationship with him? A. It was primarily a business relationship. We saw each other and we discussed business and were in almost daily telephone contact because of his large volume of business through my agency, and rather infrequently, I would say, we had some social contact, also.

Q. Prior to his illness, could you describe whether or not he was apparently a strong, healthy, energetic person? A. I certainly felt so; yes, sir.

Q. When did you first become aware that he was ill? A. In the summer of 1961. I felt that he was.

Q. How did you learn of it? A. In the summer of 1961, we had an outing. The first [11] time I noticed anything was what seemed to be a queer cast to his eye. I knew that it wasn't normal, and that is the first time I thought something was wrong.

Q. Shortly thereafter, did you learn anything more about his condition? A. He told me later that it was diagnosed as Bell's Palsy; yes, sir.

Q. During the period that he had Bell's Palsy, did you observe any decline in his condition? A. What do you mean?

Q. Did he seem to get better or get worse, following your first observation? A. Following my first observation, he got worse, I would say.

Q. What did you observe about the decline in his condition? A. His appearance, as far as — I don't know what you call it — partial paralysis on one side of his face.

Q. What about his ability to talk? A. That was impaired some.

Q. Did you become aware that his illness was more serious than simply Bell's Palsy during the summer of 1961? A. No, sir.

* * *

[13] Q. When you talked to Marvin, or the Office Manager, what did they tell you about the reason for his being in the hospital in New York for an operation? A. I don't recall what they said. I just know that I was never aware that he had cancer until sometime late in the spring of 1962. I don't know what it was I thought he had at the time. I knew there was something wrong with the gland, but I didn't know what it was.

Q. You knew that while he was in New York? A. Yes.

Q. Did you know enough about medicine to know that something being wrong with the gland was something different than Bell's Palsy, as of October, 1961? A. Probably; yes.

* * *

[14] Q. Did you notice any marked difference in his appearance after his return from the operation? A. I don't recall that I did, other than the scars. I was aware of those.

Q. Could you describe whether they were minor scars, or were they major, in appearance? A. Let me say that they were large scars. I don't know what you mean by "minor" or "major."

Q. They were not just a single mark of a cut? A. It was a large scar.

Q. Was that on his neck? A. As I recall, yes. It was through here — his neck.

Q. Could you point on your own body as to where the scars began and where they ended? A. No, sir; I couldn't.

Q. Did they extend from one side of the neck under the jaw and under the ear? A. I don't recall now.

Q. They were clearly unsightly? A. I didn't think so, really. Maybe my feelings were colored somewhat by respect and liking for the gentleman. I didn't think of it that way.

* * *

[15] Q. Did he have any difficulty in talking on the phone at that time, after his return from the operation? A. Let me put it this way: He didn't talk certainly with the freedom that he did before.

Q. Would you describe what you observed about the progress or the decline of his condition, from the time he returned from the operation until the spring of 1962, at which time, you indicated previously, that you knew he had cancer? A. Yes. I was told by someone at that time. I didn't notice that there was any marked change in his appearance.

Q. Did you observe any marked change in the extent of his work? Had his work not been reduced considerably? A. I would assume that, certainly. We got probably almost as much business. I would have to check our records. But he and his son worked jointly on business. I [16] don't recall that the volume of business, as far as that goes, slacked off at all.

Q. You don't know, of your personal knowledge, apart from the volume of business from his office, how much he was personally producing? A. No. I know he wasn't as active certainly.

* * *

[17] Q. Won't you try to recollect as to what was said at the time you first discussed the matter with Sam? A. I can't tell you honestly whether I ever discussed the nature of his ailment with Mr. Sugar or not.

Q. Do you mean then or ever? A. Then or ever.

Q. You didn't, during the summer of 1962, discuss with Sam the fact that he had cancer, and that his condition was declining? A. No, sir. I don't recall that I did.

Q. Do you deny that you did? A. No, sir. I wouldn't say that. I can't recall exactly. My conversations with Mr. Sugar were generally on business and things like that. I don't think I discussed his ailment.

Q. Was he not, for some period prior to his becoming ill, the outstanding agent as far as volume for Penn Mutual in this area? [18] Yes, sir; he was.

* * *

Q. Did you discuss with him the nature of the cancer and how it was affecting his other organs, his vision, and whether he had double or triple vision? You heard him discuss that, didn't you? A. Yes.

Q. You heard him discuss, also, the fact that he couldn't talk very well, that it involved his throat, and that is why he couldn't take phone calls. You remember that in the summer of 1962, don't you? A. Let me say that he had told me that he had trouble with his vision, and all

these conversations are what he told me. I didn't try to get any of this information. He told me, I think, probably that it wasn't as easy to talk at length on the phone. [19] I don't remember when he stopped coming to the office, but he kept coming to the office. I do know that he rested in the afternoon, for example, after lunch. I don't recall Mr. Sugar resting before his illness in the afternoon.

Q. He had been very energetic? A. Yes.

Q. I am still speaking of the spring and early summer of 1962. I am trying to get from you for this record your version of how this man's apparent condition had declined, based on two things — your conversations with him and your observations of him. Can you help me in putting that on the record? A. The only thing I can say, Mr. Bress, is that he had declined after the operation. I didn't notice any great deterioration from that point on, in my contacts with him.

Q. What about in the spring and summer of 1962? During that period he had virtually curtailed all business activities, had he not? A. I don't know. All I know is that the business he was doing through our office still carried his name on it, and we had a good volume of business throughout all of 1962.

Q. Did your company not receive information about the nature of his illness in July? A. Yes, sir. I would assume they had been getting it right along, because we had the Group Health plan and I know [20] our companies under the Group Health plan were paying claims.

Q. You were paying benefits to him? A. The company was; yes, sir.

Q. Your company is still not so large that one department did not know what the other was doing? A. They knew.

Q. You knew, as a matter of fact, from a memorandum that had been sent to you that as of July, when these benefits were being paid to him, his daily routine was to go for X-ray treatments every morning at around 11:00 o'clock, then go to his office, where he looked at the mail, then had lunch, then took a nap, and then hung around the office,

in order to give him something to do? A. You say, "July." I know he had to go for X-ray treatments. I couldn't tell you exactly what month. I told you earlier that he came to the office and took rests after lunch. I know certainly that he wasn't anywhere nearly as active as he was prior to the summer of 1961. You must understand, Mr. Bress, that Mr. Sugar had other business interests besides the Penn Mutual. I don't know what was going on in connection with those. I do know that we got a good deal of business from Mr. Sugar's office.

Q. My question is: As of July, 1962, was not Penn Mutual fully informed that he was totally disabled? A. I think I wrote the company that I felt he was [21] totally disabled in the terms of how we determine disability.

* * *

Q. When was he placed on total disability and was paid insurance benefits by reason thereof? A. I can't give you that date because my records don't show — I believe when the company declared him disabled, he had waived the premiums on his life insurance benefits, on some of his life insurance, and he was, I believe, declared totally disabled for those purposes. I believe my records will show that sometime in the [22] summer of 1962, I wrote a memorandum that, as a layman, I thought he was totally disabled.

* * *

[23] BY MR. BRESS:

Q. Did you receive any response to any of those communications from the home office relating to the disability payments or waiver of premiums? A. I believe his insurance premiums were waived, so that would be a positive response.

Q. I would like to know if there was any correspondence on this subject with the home office, on the subjects of waiver of premiums, disability payments, determination of total disability, and any other matter relating to the physical condition of Sam Sugar as of the summer of 1962. A. I know that sometime in the summer of 1962 — we

are pretty close to Philadelphia and we make a lot of use of the telephone. One of the agency offices called me. He had been looking over this medical information and so forth. [24] He felt that I should advise Mr. Sugar to effect early retirement, in view of the information as he had read it and in view of the information sent to the home office. At that time I did get in touch with Mr. Sugar and discuss this in connection with being disabled, and then he elected early retirement.

Q. When was the first time that you discussed the subject of early retirement with him? A. Sometime in the late summer of 1962.

Q. Did he broach the subject or did you broach it? A. I broached it.

Q. He made no mention to you on that subject of retirement or his pension benefits until after you raised the subject? A. Let me put it this way: Mr. Sugar was a very careful and meticulous man. I know—

Q. I wish you would just respond to my question, sir.

MR. BALLARD: I think he is trying to answer it.

MR. BRESS: I am not asking about Mr. Sugar's character or his meticulousness. I am asking him a specific question of fact. Read it back, please.

(The question referred to was read by the reporter.)

THE WITNESS: To the best of my knowledge, my [25] answer to that question is "yes, sir."

BY MR. BRESS:

Q. Where was that discussion held? Fix the time and place. A. I can't answer that, sir, because I am not sure whether it was when he didn't come to the office any longer.

Q. Did you go to see him at his apartment? A. Yes. I saw him at his apartment, as well as his office.

Q. Do you recall that you discussed the subject matter with him at his apartment? A. Yes.

Q. You went there with the specific purpose of discussing that with him? A. Yes, sir.

Q. You went there pursuant to the suggestion of the home office?

A. Yes. Wait a minute. When I originally brought it up, I am not sure whether it was at the office or his home, but I do know that at his request I got certain information and that was discussed, I am pretty sure, at his apartment in September of 1962.

Q. Did you bring any documents there to him to sign? A. Not at that first discussion; no, sir.

Q. Then the first time it was discussed with him on [26] the telephone? A. No, sir.

Q. You made an appointment to go to his home to see him about this subject? A. The first time I raised the question of early retirement, I cannot recall whether it was at his office or at his home. The second time, or another time, when I discussed it with him, when I had specific information that I had gotten from the home office at his request, was at his home and I had that information with me.

Q. With respect to the first time it was discussed with him, give us the time of that, if you will please. A. I would assume it was toward the end of August, 1962, or in the middle of it.

Q. That was not a telephone discussion? A. I don't believe so.

Q. You are not certain? A. I would say it was definitely not. I couldn't discuss that kind of thing with him over the phone.

Q. Why not? A. I feel when I am bringing up a subject like that, I should discuss it face to face.

Q. As of the time you discussed it with him face to face, either at his home or at his office, had you already [27] discussed the subject with the home office? A. Yes, sir.

Q. As a result of that conversation with him, you reported on it to the home office? A. I requested some information as to certain types of elections he could make.

Q. Did you write any letter of inquiry to the home office with respect to that? A. Yes, sir. I must have, because I have an answer referring to my letter, but I can't find my letter.

Q. Would the original of your letter be in the home office in Philadelphia? A. I would presume so.

Q. You do, however, have in your file a copy of its reply? A. Yes, sir.

* * *

[28] Q. What did the insurance company send you, as far as any document for signature was concerned? A. Subsequent to when they sent me some information and I discussed it with him, then we asked for election of early retirement papers. They sent me a statement which he signed and also the type of election he wanted in naming the beneficiary, and so forth.

Q. How many times did you confer with him at his office and his home on the subject of his retirement, prior to his signing the form designating the beneficiary? A. I know specifically two times and probably some more. I don't know how many.

Q. Was anyone else present during any of your discussions with him at his home or office, concerning his retirement? A. I know that Mrs. Markus was in the apartment one time, but she left the room, so I don't recall that she was right with me at the time we discussed this.

Q. Was that the occasion when he signed the documents? A. To my knowledge, yes. At the time he signed those documents, I believe Mrs. Markus was in the apartment.

Q. Did you bring the documents to him already typed in? A. Yes, sir.

Q. You just handed him the documents on that occasion to sign?
[29] A. We discussed it. We discussed making an earlier date on it.

Q. What was that, about an earlier date? A. I suggested that he go ahead and make it right now.

Q. What did "right now" mean? A. The date on the documents was apparently October 1. That is the date he signed them.

Q. Is that the first time you brought the documents up to him to see? A. Yes, sir. That is the first time.

Q. When you brought them up to him on that date and he signed them, had those documents been filled in in Philadelphia and sent to you? A. Yes, sir, in accordance with his request.

Q. I didn't ask you that. I only asked you whether they had been filled in and sent to you from Philadelphia. A. Yes, sir.

Q. Do you have the communication that came along with them from Philadelphia to you? A. I presume I have. I don't have it here right now. I presume I have it in my file.

Q. Is that a form letter of transmittal or a detailed, personal letter to you concerning it? A. I don't believe it was a detailed personal letter.

Q. Had you, in a prior communication to the home office, [30] written to them about the date of retirement? A. I had to request the papers and the date, so that had to be, I presume. I can't find it in my file, but I presume the company would have my request, unless by chance I did it over the telephone. But I don't think I did.

* * *

Q. Was it in reply to that letter of inquiry that you received these forms back about the end of September or the first of October, which you took there to Mr. Sugar for signature? A. Yes. He asked for information. We got that, and then we asked for the forms to actually elect.

Q. They came in all filled in from Philadelphia? A. That is right.

Q. I understand that it is either two occasions or possibly three, prior to the visit on October 1 to Mr. Sugar's apartment, that you had discussed with him his [31] retirement under the insurance agent's plan, either at his office or his home. Is that correct? A. Yes. I know of two, and I think there were more.

Q. In the course of your discussions with him, did you show him any of the figures that revealed that he was entitled to the same retirement benefits whether he lived to October 11 or November 11? Did

you show them to him? A. Yes. It showed that in order to get the benefits, he had to be alive.

Q. Did you show him — A. I showed him the figures.

Q. Did you show him that if he had elected a date of October 1, his pension would be just as much without the risk of not living to November 11? A. No. It was clearly stated that it would be slightly more if he waited until November as opposed to October, because it required another payment, among other things, on his part.

Q. Had he made a payment for October? A. Not at the time that we discussed which election he was going to take.

Q. Did he make a payment? A. Yes.

Q. When he made that payment for October, when did he make the payment? [32] A. I think, sir, this is done automatically by my bookkeeper. I believe it is toward the end of the month, so it would be toward the end of October. I could give you that specific date.

Q. He made a payment in October. If I understand it, no other payment became due before November 11. Is that correct? A. That is right.

Q. Did you tell him that when he made his payment in October, he could retire with the same benefits in October without waiting until November? Did you tell him that? A. No, sir. I didn't tell him that.

Q. Did you tell him that without making the October payment, it would be only a difference of pennies in what his retirement benefit would be, if he elected to retire on October 1? Did you tell him that? A. I don't know if I did or not. He knew this better than I did.

MR. BRESS: I move that answer be stricken as not responsive.

BY MR. BRESS:

Q. I asked you what you told him. A. I can't tell you, sir. I don't know.

Q. Is it not a fact that the subject of his early retirement was raised by Mr. Sugar and not by you?[33] A. Not to my recollection, sir.

Q. When you say that, do you mean that you don't deny that he raised it first, or you do deny that he raised it first? A. To the best of my knowledge, I raised the question first.

Q. On the occasion when he did sign, did he tell you that he wanted his sister to have all of his retirement benefits? A. Yes. He indicated her as beneficiary.

Q. But you talked to him on the occasion before he signed the document, didn't you? A. Yes. I had to — wait a minute. I would presume that was typed in, so I think it was prepared at his request prior to the date. So I doubt if we discussed much other than, as in any situation like this, the way you want it, you know, and going over it.

Q. On the occasion that you discussed with him the way he wanted it, you didn't have the documents there? A. He told me.

Q. He told you he wanted his sister to have his retirement benefits? A. That is correct. Yes, sir. Let me say one thing. He wanted her to have this as beneficiary under the retirement plan. Prior to that [34] time, he still had it as it was before, which was the Executor or Administrator of his estate, if he had not retired. He didn't change that.

Q. When he talked to you, he told you he wanted his sister to be his beneficiary? A. Under the retirement payments, he wanted his sister to be beneficiary.

* * *

Q. When prior to the receipt of these papers already filled in for signature did you have your conversation with [35] Mr. Copple, the Actuary? A. Sometime around the middle of September I would say, because there were some questions that Mr. Sugar raised.

Q. What were the questions he raised? A. One of them was this one that was referred to earlier, that we felt that the taxable portion of his retirement benefit was high — the income tax portion of it. I know that the home office wanted to know what would be the last monthly contribution, and I know I have some notes that he wanted to make his Octo-

ber payment, so the papers could be calculated reflecting that payment being made.

Q. Did you tell Mr. Sugar in September when you talked about this with him, what his retirement benefits would be if the September payment was the last payment? A. The exact amount? No, just that it would be slightly less than shown in the figures for November.

Q. Do you know how much less it would be? Would it be a matter of pennies? A. Yes, sir.

Q. Just pennies? A. Just pennies.

Q. You didn't have any discussion with him about that, however?
A. About what date to use?

[36] Q. Yes. A. Yes, sir.

Q. You didn't have any discussion with him about how much less benefits would be if he chose September? A. Not in terms of specifics, no, sir.

* * *

[39]

CROSS EXAMINATION

BY MR. BALLARD:

[40] Q. With relation to the documents which Mr. Bress asked you about and which the company sent back filled in with dates and names and so forth, who selected those names and dates to go in those documents? A. Mr. Sugar.

Q. Did you attempt to influence him in any way as to what names or dates should go in those documents? A. Dates, not names.

Q. With respect to the dates, in what respect did you attempt to influence him? A. Just to do it right away.

Q. Tell us what Mr. Sugar's experience was in the field of retirement plans generally, and specifically with relation to Penn Mutual's plan. A. He was one of the most knowledgeable experts in this field locally. He had sold many pension retirement plans with various companies in the city. He, I am sure, knew thoroughly the terms of our company's retirement plan.

MR. BRESS: I object to the conclusion of the witness as to what he thought Mr. Sugar knew.

BY MR. BALLARD:

Q. Speaking broadly, what was the character of the company's plan? A. What do you mean by "character?"

Q. In insurance terms, what type of a plan is the [41] company's plan?

MR. BRESS: I think the plan speaks for itself. It is documented, and I would object to this as not being the best evidence of the plan.

BY MR. BALLARD:

Q. Answer it. A. It is a fully insured plan. Single premium deferred annuities are the bases of the plan.

Q. Was it generally similar to other plans of that type which Mr. Sugar had written for other clients? A. I think so.

Q. Was there anything particularly different about it from other types of fully insured plans? A. In most of the fully insured plans, we try to include life insurance with them. This plan did not have any.

* * *

BY MR. BALLARD:

Q. State what differences you can think of. [42] A. Outside of the fact of the vesting schedule, it was the same as many plans. Many plans had a more liberal vesting schedule. Other than that, I don't think there was much of any difference.

Q. Was Mr. Sugar's mind perfectly clear at the time you had these discussions with him relating to these names and dates that went into these documents? A. I feel he understood clearly the whole matter.

Q. To your knowledge, how long had Mr. Sugar been writing plans of this type? A. I know he wrote one in 1944 and I know he had been writing them since then. Prior to that, I don't know whether he did or not.

MR. BALLARD: That is all.

REDIRECT EXAMINATION

BY MR. BRESS:

Q. You told Mr. Sugar that there was no point in waiting, because you felt he should have retired at the earlier date. Is that correct? A. I felt he should retire right away.

Q. And you told him that? A. Yes.

Q. What language did you use in telling him that? A. I don't recall specific words.

[43] Q. Give us as closely as you can the language that you used in telling him that there was no point in waiting. A. I don't think I can tell you specifically how I said it. I know it was discussed and that is about all I can say.

Q. Do you mean that the subject was discussed of his being better off retiring as of the time you talked with him and not deferring it to a later date? Is that correct? A. Yes, because we discussed why he would be better off.

Q. He would be better off because it was a certainty that there would be no risk of death if he deferred it to a later date? A. No risk of death?

Q. The reason why it was preferable to take the earlier date was that his condition was such that he might die before the later date arrived? A. Yes, I felt that way.

Q. Your testimony is that you urged him because of that reason, to take the earlier date. Is that right? A. Yes, sir.

Q. He refused to take the earlier date, even though you urged him for the reason stated? A. I don't know for what reason he didn't want to do it, but he didn't.

[44] Q. Is it not a fact that he was not able to read the documents on the 1st of October? Didn't you read them to him? A. I don't recall whether I did or I didn't.

Q. You know he didn't read them. You presented them as documents sent to you from Philadelphia. Is that right? A. I don't know.

Q. You don't know whether he was able to read them? A. I don't remember now whether he read them or I read them.

Q. You don't remember whether he was able to read and had been able to read sometime prior to October 1? A. I couldn't swear to it at this sitting, sir.

Q. But you say his mind was clear? A. I felt it was.

Q. You don't know the extent to which he was under sedation at the time? A. No, sir.

* * *

DEPOSITION OF JOHN R. BOWEN, M.D.

[Washington, D.C., Friday, May 21, 1965]

[3] EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. KLAVAN:

Q. State your full name, please, Doctor? A. John Raymond Bowen, Jr.

Q. Your home address? A. 304 Spring House Lane, Morestown, New Jersey.

Q. You are a medical doctor, is that correct? A. Correct.

* * *

Q. I assume that you are employed by Penn Mutual? [4] A. That is correct.

Q. What is your capacity there? A. I have a title of associate medical director.

Q. What does that mean? A. I am an officer of the company and I am — I work in the medical department under the medical director, assist him with medical affairs of the company.

Q. Who is the medical director? A. Bryan A. Dawber.

Q. When you use the words "medical affairs of the company," would you tell us in a little more broad terms what are the medical af-

fairs of your company? A. Well, basically I am employed to work in the selection of risks; that is the life and health risks. Secondly, I assist the claims department when necessary. I assist with the employee health and advise any other part of the company as to medical questions, terminology, etc.

Q. Would you tell us in connection with selection of risks, does your job encompass determining whether the company should take on a particular risk? A. That is correct, for medical reasons.

Q. And by that, does it also include advising the company as to whether it would be financially beneficial to the company [5] to accept a particular risk or, stated in another way, that a person might not live long enough to make a particular contract profitable to the company?

A. That is correct.

Q. What percentage of your work involves selection of risks? A. Approximately 60 percent.

Q. In this work, and please correct me if I am wrong, you require a broad knowledge of the general medical field? A. Yes, sir.

Q. The mortality rates from various conditions and diseases, is that correct? A. That is correct.

Q. In your field and in your practice have you in the past had occasion to deal with the condition known as a malignant tumor of the parotid gland? I believe my pronunciation is correct. If I am wrong tell me. A. Yes, sir.

Q. Have you seen it often? A. No, it is not common.

Q. Did you have occasion in your employment with Penn Mutual to come across this condition with one Samuel Sugar? A. Yes.

[6] When did you first have anything to do with this condition as applied to Samuel Sugar? A. Well, approximately the summer of 1962.

Q. Would you tell us what happened? A. I made a telephone call to Mr. Sugar and to his doctor, one of his doctors.

Q. Before we get onto that, something happened before that that

would make you make a telephone call to Mr. Sugar, didn't there? A. I don't honestly recall.

Q. Have you taken the time to look over the records of Penn Mutual? A. Yes, sir.

Q. Is there anything that refreshes your recollection as to why you called? A. No.

Q. Prior to that time Mr. Sugar had filed certain documents with the company, had he not? A. Yes.

Q. Dealing with his health? A. Yes, sir.

Q. Have you looked over those documents? A. I have now recently, yes.

[7] Q. What documents are those? Do you have them with you?

A. I have looked over the — this document, what was that called?

MR. BALLARD: Interrogatories.

THE WITNESS: (Cont'd.) Yes, interrogatories and the various claim forms we received.

BY MR. KLAVAN:

Q. You familiarized yourself with those? A. To a certain extent.

Q. Going back to the summer of 1962, does it refresh your recollection now whether you familiarized yourself with certain documents Mr. Sugar furnished or doctors furnished on his behalf or someone else furnished on his behalf relative to his physical condition? A. I don't recall that.

Q. Please correct me if I am wrong, you made a 'phone call to Samuel Sugar and one of his physicians in the summer of 1962, but you don't recall the background leading up to it, am I correct? A. No, I do not.

Q. Am I correct? A. That is correct.

Q. Tell us first about your 'phone call to Samuel Sugar? [8] A. I don't recall anything more than actually making a call. This I do recall. I fortunately made a memorandum of such a call.

Q. Do you have it? A. Yes, I do have it. This is it.

Q. May I see it? A. Yes (handing a document to counsel.)

MR. KLAVAN: Let the record show that Dr. Bowen is showing me a paper which at the top says, 'Medical Department Memoranda; date, August 13, 1962; Subject: Samuel J. Sugar — Policy No. 0002; Claim file.' I ask that you mark this plaintiff's exhibit No. 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification. A photocopy is attached to the court copy.)

BY MR. KLAVAN:

Q. Have you seen it today? A. Yes, I have.

Q. Your memo states: 'I called Sam Sugar himself concerning what happened. . .' Tell me what you mean by the words 'what happened'? A. I don't recall.

Q. You say 'Sam sounded terrible over the phone.' Could [9] you describe in a little more detail what you mean by 'sounded terrible'. How did he sound? A. I don't remember the exact timbre of his voice except that he did sound weak. I recall that. Well, of course, I had spoken many times with Mr. Sugar on the telephone as well as personally and I knew his voice. This was quite a departure from his normal voice.

Q. Was it enough to alarm you as a doctor? A. Yes, I believe so.

Q. Can you remember anything about the conversation and the fact that Sam Sugar stated that he went to the doctor every five weeks to have eyelashes removed from his eyes? A. No, sir, I don't recall at all.

Q. Did this statement that it was necessary for him to have a doctor take eyelashes out of his eyes mean anything to you as a physician? A. Yes, it would.

Q. Would you tell me what? A. Well, it would mean that his tissues around his eye were probably swollen to such an extent it inverted his eyelids so his eyelashes would then probably be pointing inward causing, of course, pain and irritation to the eyeball itself.

Q. Is this a serious condition? [10] A. Yes, it is.

Q. Is it usually caused by — A. Anything that would cause the eye to swell.

Q. But you knew what caused his eyes to swell, didn't you? A. Yes, I knew that Sam had cancer at that time.

Q. You knew that it had progressed? A. No, sir, I did not know that.

* * *

Q. You knew he had this condition of his eyes? A. No, sir.

Q. When he told you? A. When he told me I did, yes.

Q. Once he told you you knew he had the condition with his eyes? A. Yes.

Q. Did these two facts lead you as a physician to draw any conclusions as to his condition? [11] A. Whether I drew any at the time or not I don't recall except it would be logical to assume that Sam was in failing health.

Q. Now, the words "failing health," as you use them mean what? A. Well, that he was becoming more ill from his disease.

Q. With reference to death, what was your feeling? A. I believe by this time it would be apparent that Mr. Sugar had incurable cancer and the end result of that, of course, is death. This would be a logical conclusion.

Q. That wouldn't take a doctor, though, to figure that one out? A. No.

Q. After you spoke to Samuel Sugar you called Dr. Simpson? A. Yes, sir.

Q. Would you tell us first, was there any particular reason that you called Dr. Simpson? A. I can't recall why I called him now.

Q. You say in the memo, "I then called Dr. Simpson and he confirmed this," meaning, I believe, that the eyelashes had to be removed? A. That is correct, yes.

Q. Then you said: "The doctor stated that Sam was [12] in very

poor condition and he does not feel that he should do anything more than to try and make him more comfortable as he does not have too much longer." A. Yes.

Q. Do you remember that? A. Yes.

Q. How much longer did he say he had? A. He didn't say. I believe that is a direct quote.

Q. He also stated "that the eyelashes are merely plucked out with tweezers and not cut." Did that have any particular meaning to you?

A. No, I don't believe so.

Q. If it was not necessary for Dr. Simpson to cut and he could just use a tweezer, can you tell me as a physician whether in your opinion or why in your opinion Samuel Sugar couldn't take the eyelashes out himself? A. No, I have no idea.

Q. You wouldn't want to — A. I wouldn't want to hazard a guess, no.

* * *

[14] Q. Have you reviewed any of his medical records at any time? A. Yes, within the last two days.

Q. Did anything that you saw in reviewing those medical records refresh your recollection as to something you might have done prior to Samuel Sugar's death in November of 1962? A. No, sir.

Q. As a result of your review in the last couple days of Samuel Sugar's medical records I would like you to tell me what his physical condition was on October 1, 1962 as shown by those records?

[15] MR. BALLARD: If you know.

A. I don't know. I can't tell by those records without reviewing them again at this time.

BY MR. KLAVAN:

Q. Where are the records? A. Do you have the records?

MR. BALLARD: What records do you want, Mr. Klavan?

MR. KLAVAN: The ones that he reviewed.

MR. BALLARD: Off the record.

(An off-the-record discussion was had during which documents were produced. Then the pending question was read by the reporter.)

THE WITNESS: I can't make a statement to that effect from these records as of October 1st.

BY MR. KLAVAN:

Q. Can you make a statement as of any date based on those records? A. There is a statement, a memorandum dated August 2, 1962. Would you like me to read it?

Q. Well, I think I have a copy of that. That is from Sugar and Sugar? A. Yes.

Q. Tell me what other records you have there besides [16] that one? A. There is another letter from Sugar and Sugar signed by Mr. Samuel Sugar, July 24, 1962.

Q. Would you just go through them and tell us what each of those are. A. And a statement of claim for disability benefits signed by Dr. Samuel Sugar. This is dated August 11, 1962. There is a statement of claims signed by Dr. Samuel Sugar, November 28th, 1961, which is a health claim, statement of claim.

Q. Is that all of them? A. Yes.

* * *

[17] BY MR. KLAVAN:

Q. Now, Doctor, I am looking now at the form. At the top it states, "The Penn Mutual Life Insurance Company, Statement of Claim, Group Health Insurance for Agents and Agency Office Employees." It is signed on November 27, 1961 by Samuel J. Sugar. It is also signed by Wayne E. Dorman on November 30, 1961, and it is signed by Samuel Sugar, M. D., on November 28, 1961. Now, Samuel J. Sugar states that he has a parotid gland tumor. The doctor states that he had a tumor of the left parotid gland, symptoms first appearing around July 15, 1961; that on [18] October 25, 1961 there was an excision of the left parotid gland tumor and excision of the cervical, I believe it states, left lymph

glands by David Catlin of New York City. Based on these procedures mentioned by Dr. Sugar, did you as a physician or do you now as a physician have an opinion as to whether the — first of all the tumor was malignant or benign? A. Well, I would have to state that I felt it would be malignant or otherwise they probably would not have removed the cervical chain of lymph nodes.

Q. As of that date, the last date, November 30, 1961, did you have any recollection around that date of having ever seen this document?

A. No.

Q. In other words, the first time you saw it was in the last couple days? A. Yes, sir.

Q. In your opinion, Doctor, if a document such as this came into Penn Mutual and to you as an assistant medical director, would anything be told to the company about the prognosis for this individual? A. That is a tough question to answer.

MR. BALLARD: Do you understand the question?

THE WITNESS: Yes, yes, what would I routinely do, I believe, [19] is what he means with such a thing if this had come to me. We are supposing this had come to me directly rather than gone through our usual channels. A judgment would have to be made at the time I saw that because this information is considered confidential. We feel that anybody's medical history is confidential until they wish to have it released. A judgment would have to be made at the time of receiving this claim whether or not some third person should be apprized of its contents.

* * *

[20] MR. KLAVAN: Might this form dated November 27, November 30, and November 28, 1961 be marked as Plaintiff's Exhibit No. 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification. A photocopy is attached to the court copy.)

BY MR. KLAVAN:

Q. Now I see among the papers you handed me a memorandum of August 2, 1962 from Sugar and Sugar, Insurance. It is unsigned and says: 'Re: Illness of Samuel J. Sugar; Policies 2631398 and 2638336; Group Insurance Claim #11-002466.' I will [21] ask you to look at that memorandum (handed to witness). A. Yes, sir.

Q. Would you tell us first of all whether you have any opinion as to whether this man was in extremis, the man described on this memorandum? A. Would you define "extremis" for me.

Q. Apt to die at any moment? A. No.

Q. Could you tell us what your prognosis would be for a man as described in this memorandum? A. Educated guess would be a maximum of probably six months.

Q. The minimum of what? Tomorrow morning, meaning — A. No.

Q. — August 3rd? A. No, that would not make me believe he was going to die tomorrow morning.

Q. What would the minimum be, Doctor? A. I can't give an honest answer to that. I can't say.

Q. Well, you have said that the maximum, you thought, would be six months, and you didn't think it would be tomorrow morning, meaning August 3. So it would be somewhere between two days and six months?

[22] MR. BALLARD: I haven't heard any testimony about two days.

THE WITNESS: I would hesitate to make a guess. This is something I refused to do when I was in the practice of medicine simply because so many doctors are proven wrong. It is very difficult to make a guess as to how long a man will or will not live from any given condition, particularly something which is a chronic disease such as cancer. I would hesitate to set any specific time. I would say it would be very likely he would not live more than six months, but I would hesitate to

say how much sooner he would go than six months. I am not trying to be specific with this six months, but that would be my educated guess of longevity on a thing like this.

BY MR. KLAVAN:

Q. Six months from when? A. This was current memorandum and this was his condition on August 2. I would say he would probably last sometime around six months.

Q. But no one could tell for sure? A. No, this is impossible.

Q. What is the significance of the double vision described in that memorandum? A. Well, this memorandum describes a muscle imbalance of the left eye. He obviously had invasive cancer and with an [23] invasive cancer you can have an affectation of any surrounding organs, and the sixth nerve being a cranial nerve would be a likely candidate to be involved; and if it were, he would have muscle imbalance of his left eye.

Q. By "invasive cancer," do you mean the cancer had spread? A. Yes, sir.

Q. To other places — A. No, when you speak of invasive cancer you mean it invaded from its original site in contra-distinction to a metastasis which is a distant spread of a cancer.

Q. I see. From looking at the memorandum could you tell what had happened to his left arm? A. I would have to make a supposition.

Q. What would that be? A. That he had a metastatic lesion of his spine.

Q. Which had affected his arm? A. Yes.

Q. And the esophagus. A. Here again a metastatic lesion to the chest.

Q. Now reading this memorandum where else would you say it had spread besides the places which you have already stated? A. There is no evidence that it had spread anywhere [24] except locally to the spine and to the chest.

Q. Doctor, it would be safe to say this was a very sick man? A. Yes.

MR. KLAVAN: Would you mark this as Plaintiff's Exhibit No. 3 for identification.

(The memorandum dated August 2, 1962 was marked Plaintiff's Exhibit No. 3 for identification. A photocopy is attached to court copy of this transcript.)

BY MR. KLAVAN:

Q. Now, among the papers which you have handed me is a form dated August 11, 1962, completed by Samuel J. N. Sugar, M.D., and on this form it shows that the illness began or it states the illness began about July 1, 1961; that present condition was double vision, weight loss, paralysis of the left 6th cranial nerve. On April 16, 1962 an x-ray showing metastasis in parenthesis. The insured was partly house confined. Diagnosis of adenocarcinoma of the left parotid gland with invasion of adjacent muscle and lymph nodes. It shows on this form there was complete disability; that the patient was receiving extensive x-ray and therapy. Now, based on that form, if that had come to your attention, Doctor, would you have had any prognosis as to the amount of time Mr. Sugar had? [25] A. No. This is a difficult question to answer. In my experience I have seen these people last quite a long time and some of them, of course, go very rapidly. There is no evidence on these forms of the anaplastic nature of the tumor. These things would have to be considered. Its ability to react to therapeutic agents. This is not here; therefore, I couldn't make an adequate estimate.

Q. Based on that form you will agree that this was still a very sick man? A. This man was in danger of an early demise, yes.

MR. KLAVAN: Would you mark this as Plaintiff's Exhibit No. 4 for identification, please.

(The form dated August 11, 1962 was marked Plaintiff's Exhibit No. 4 for identification. A photocopy is attached to the court copy of this transcript.)

BY MR. KLAVAN:

Q. Based on your experience with people suffering from cancer and other types of incurable diseases who have reached the stage reached by Samuel J. Sugar as shown by this document of August 11, 1962, are you able to state whether these people can make a rational judgment pertaining to things in the future? A. Yes, they can.

Q. Are they able to make a rational judgment which might [26] involve when they will be living or dead? A. I can't answer that question.

Q. You have no opinion on that? A. I have no opinion on that.

Q. Has it not been your experience that people suffering incurable illness will not face up to the fact that they might be dead by a particular day? A. Yes, I have seen this; people are unaware of the fact that they are going to die soon.

Q. That wasn't my question. A. I am no — I'm sorry. I can't make a categorical reply to you. I believe that certain people do have insight and others do not. I can't answer your question the way you wish. I'm sorry.

Q. If the company had been asked to insure Samuel J. Sugar's life for the period August 11, 1962 through November 11, 1962, a period of three months, would you as associate medical director dealing in selection of risks recommend to the company that for a particular premium to be determined by the actuary department, I believe, or the underwriting department, cause such insurance to be issued on the life of Samuel Sugar? A. Mr. Sugar would be uninsurable.

Q. By "uninsurable," then your answer is no, you would not? [27]
A. No, I would not.

Q. The reason you would not would be what reason? A. You are assuming that I had all this information?

Q. Correct. A. Because, like I stated before, the unpredictability of a person in this type of condition is great. You can not predict his terminal illness as to its duration.

Q. Well, the predictability of anyone's life is not capable of accurate prediction and you use actuaries in your business, is that correct? A. That is correct.

Q. But even with an actuary you would not insure Samuel J. Sugar even for a period of three months, would you?

MR. BALLARD: Restate that question. He doesn't have anything to do with insuring people.

BY MR. KLAVAN:

Q. Let me say recommend. You would not recommend insuring Samuel J. Sugar for a period of three months? A. No. We have no experience in the life insurance business as to this type of risk. I would be unable to have an opinion.

Q. If you were called on to give an opinion would you advise the company not to insure him? [28] A. That is correct.

MR. KLAVAN: I think that is all I have of the Doctor. I would like to, however, offer these exhibits — if you would like me to I can have them copied right here, Mr. Ballard, and we can give them to the reporter. O.K.?

MR. BALLARD: Sure. I have just one question.

EXAMINATION BY COUNSEL FOR DEFENDANT

BY MR. BALLARD:

Q. Insofar as you recall the 'phone call that Mr. Klavan inquired about, Dr. Bowen, do you recall whether that was made in order to verify some specific claim that had been filed by Mr. Sugar or as distinguished from merely inquiring about the general state of his health? A. It was made in connection with a claim.

Q. Do you recall — that is all you recall, is it? You don't recall what specific type of claim? A. Not by memory, I do not, no.

* * *

DEPOSITION OF WILKINS S. THOMSON

[30] EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. KLAVAN:

Q. Would you state your full name, please, Mr. Thompson? A. Wilkins Styles Thomson.

Q. Your home address? A. 18 Eighth Avenue, Haddon Heights, New Jersey.

Q. Where are you employed? A. Penn Mutual Life Insurance Company.

Q. How long have you been there? A. 39 years.

Q. Would you tell us what your present position is at the Insurance Company? A. Assistant vice-president in the agency department.

* * *

[31] Q. I see. Now, did there come a time when you learned that Samuel Sugar was ill? A. Yes.

Q. When did you first learn about it? [32] A. I would say approximately the end of the summer in 1961 — '62.

Q. How did you learn about it? A. One of my functions is the supervision of the unit which handles the group health benefits and other field benefits for our field force. And there was referred to me the disability file that Mr. Sugar had submitted.

* * *

Q. Who would have that file before you? Before it got to you who would have the responsibility for that file? A. The group benefits division which is currently under the direction of Mr. Rowland Evans.

* * *

[34] Q. What was the purpose of your seeking out Mr. Huebner to discuss Samuel Sugar's file? A. The purpose was to raise with Mr. Huebner the question of whether we had a moral obligation to call Wayne Dorman to discuss with Samuel Sugar the possibility of early retirement because of his disability.

Q. Did you say this to Mr. Huebner? Did you ask this question of Mr. Huebner? A. Correct.

Q. What was his answer? A. His decision was that we should raise the question with Mr. Dorman.

Q. And was it because of the physical condition of Samuel Sugar as you saw it in this file that you raised the question with Mr. Huebner?

A. That is correct.

Q. Would you tell me what, if anything, else you discussed with Mr. Huebner other than that one thing, whether you had the moral responsibility, I think you said, to raise the question with Mr. Dorman? Did you discuss anything else about Samuel Sugar, discuss how much time you figured he had left? [35] A. Oh, no, no.

Q. Did you seek any medical opinion from anyone in the company between the time you first saw the file and the time you first spoke to Mr. Huebner? A. No.

Q. Did you at any time after you spoke to Mr. Huebner secure or ask for a medical opinion relative to this physical disability from which Samuel Sugar was suffering? A. No.

Q. Would you tell me what next happened as far as you are concerned with regard to Samuel Sugar? A. I called Mr. Dorman at his office and pointed out, I believe, the benefit to Mr. Sugar in seeking early retirement under our retirement plan.

Q. What did Mr. Dorman say? A. Mr. Dorman was very appreciative of the call and indicated that he would discuss the question with Mr. Sugar.

* * *

[36] Q. Did you at any time speak to Samuel Sugar? A. No, I did not.

Q. To your knowledge did he know he had cancer? A. That I can't say.

Q. Did any of the forms which he had signed say he had cancer to

your knowledge, or a malignancy of any kind? A. To the best of my recollection, no.

* * *

[38] Q. In answer to interrogatory No. 9 you state that on August 15, 1962 he, meaning Samuel Sugar, was determined to be disabled under the terms of the disability waiver of premium agreement contained in policies 2631398 and 2638336 on his life. Now, you had life insurance on Samuel Sugar, is that right? [39] A. Correct.

Q. And in order to be disabled under the terms of the disability waiver of premium provisions, what had to be shown? A. I haven't the exact terms of the disability provision. It would have been total and permanent disability for a period of either four or six months, depending upon the terms of the contract. It has changed from time to time.

* * *

[40] Q. I show you what was furnished me by Dr. Bowen and comprises a part of the company's file, a memorandum; and at the top it says "The Penn Mutual Life Insurance Company, Intra-Organizational Correspondence; to W. Rowland Evans of the Group Department from Delora M. Lawrence, Cashier, Dorman Agency; and signed by Mrs. Delora M. Lawrence, Cashier." Do you remember seeing that document? A. Specifically, no. But I assume I did in a review of the file.

Q. You don't remember seeing it, however, prior to your [41] talk with the vice-president of the company, executive vice-president, Mr. Huebner? A. No, I do not.

Q. That is, though, part of the company records, is it not? A. Yes.

Q. At the bottom there is a date of September 27, 1962; "Advised Mrs. Lawrence we should have some definite word next week," with some initials. Can you recognize those initials? A. Yes, W.R.E.; W. Roland Evans.

MR. KLAVAN: Might this be marked as Plaintiff's Exhibit No. 5 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification. A photocopy is attached to the court copy of this transcript.)

BY MR. KLAVAN:

Q. Did the company or anyone in the company at any time try to secure an opinion as to the life expectancy of Samuel Sugar? A. To the best of my knowledge, none, no.

Q. Were you the only person that you know of to raise the question of early retirement or I should say were you the sole person to initiate the question of early retirement of [42] Samuel Sugar? A. As far as I know, yes.

* * *

Q. Do you know whether any advantage would accrue to Samuel Sugar by waiting from October 1st to November 11th to retire rather than to retire on October 1st? A. Only the sense of personal satisfaction.

Q. There were disadvantages, however, were there not? A. Yes.

Q. What were the disadvantages? A. I think the disadvantages would have to be in a monetary way as explained in the interrogatories. The answers in the interrogatories, I think, outlined this.

Q. Substantial amount of money? A. Yes.

Q. Did you or anyone to your knowledge explain or even state this disadvantage to Samuel Sugar? A. I did not. I presented the problem to Wayne Dorman for discussion with Mr. Sugar.

* * *

RELEVANT DOCKET ENTRIES1963

- Nov. 8 Complaint, appearance, jury demand
- Nov. 8 Summons, copies (1) and copies (1) of Complaint issued Ser 11/12/63 (Supt. Ins.)
- Dec. 10 Answer of deft to complaint; c/m 12/10/63; appearance of Frederick C. Ballard and John W. Kern III
- Dec. 10 Calendared (AC/N) (N)
- Dec. 10 Third party complaint adding I. Lewis Markus and Marvin L. Sugar, executors of the estate of Samuel T. Sugar, deceased, as third party defts.
- Dec. 10 Third party summons, copies (2) and copies (2) of complaint and third party complaint issued, #1 ser 12/12/63. #2 ser 12/19/63
- Dec. 10 Notice by deft to take depositions of pltf and third party deft #2, c/m 12/10/63
- Dec. 16 Supplemental certificate of service of notice to take deposition of third party deft #2.

1964

- Jan 7 Answer of 3rd party defendants to third party complaint, c/m 1-3-64 Appearance of Leon M. Shinberg
- Feb 12 Deposition of Marvin L. Sugar; 1/7/64 (\$66.40)
- Mar 6 Deposition of pltf 2/3/64. (\$24.00)
- Mar 6 Deposition of Wayne E. Dorman 2/3/64 (\$36.00)
- Sep 23 Interrogatories of pltf to deft; c/m 9-23-64
- Oct 13 Called Pretrial Examiner

1965

- Jan 29 Answer of deft, Mutual Life Ins. Co. to interrogatories; c/m 1-25-65.

Mar 15 First notice under Rule 13

Mar 29 Motion of plaintiff to stay operation of Rule 13; c/m 3-62-65 appearance of Bress, Bramen & Hilmer; MC 3-29-65. (AC/N)

Apr 8 Consent order staying Rule 13 until June 1, 1965; deferring certificate to ready for trial calendar to said date. (N) (AC/N) Youngdahl, J.

May 13 Notice of plttf to take deposition of John R. Bowen, M.D. c/m 5/12/65.

May 13 Notice by plttf to take deposition of Wilkins S. Thompson, c/m 5/11/65

May 25 Certificate of readiness of plaintiff; c/m 5/24/65

June 23 Depositions of John R. Bowen, M.D. and Wilkins S. Thompson.

1966

Feb. 3 Motion of defendant for summary judgment; statement; P&A P&A; attachments 3 thru 8; MC

Feb. 10 Appearance of Hilmer, Klavan & Krug for pltf; withdrawal of Bress, Braman & Hilmer.

Feb. 10 Stipulation extending time for pltf to oppose motion for summary judgment to & including 3-1-66.

Feb. 28 Opposition of plttf. to motion for summary judgment; statement, exhibit "A" & exhibit "1", c/m 2-28-66.

Mar. 15 Reply of deft to pltf's opposition to motion for summary judgment; c/s 3/15/66; affidavit & exhibit

Mar. 17 Supplemental Memorandum of plttf. in opposition to motion for summary judgment. c/m 3-17-66.

Apr. 6 Memorandum Opinion granting motion of deft. for summary judgment. (Order to be presented) (N)

Apr. 7 Official Transcript of excerpt from proceedings of March 18, 1966; (Rep: Edna B. Romig)

Apr. 8 Transcript of Proceedings before J. Gasch March 18, 1966; PP 1-19; (Rep; Edna B. Romig) Court's Copy

Apr. 14 Order granting deft's motion for Summary judgment. (N) Gasch, J.

May 6 Notice of appeal by plttf from order 4/14/66. Copies to F. Ballard and L. Shinberg. \$5.00 deposit by S. Klavan.

May 10 Cost bond on appeal in amount of \$250.00 with Travelers Indemnity Company approved.

June 7 Transcript of proceedings pages 1-19, March 18, 1966 (Rep: Edna B. Romig) (Atty's copy)

June 15 Record on Appeal delivered to USCA; Deposit to Stanley Klavan \$1.25.

June 15 Receipt from U.S.C.A. for Original papers.

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,247

EDITH S. MARKUS,

Appellant,

v.

PENN MUTUAL LIFE INSURANCE CO.,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 25 1966

Nathan J. Paulson
CLERK

**STANLEY KLAVAN
J. H. KRUG**

**839 - 17th Street, N. W.
Washington, D. C. 20006**

Attorneys for Appellant

Of Counsel:

Hilmer, Klavan & Krug

(i)

STATEMENT OF QUESTIONS PRESENTED

Defendant knew that decedent, a member of its retirement plan, was dying of cancer and that his death was imminent. Based on this knowledge, it broached the subject of early retirement. Under the retirement plan the retirement date was of critical importance. If decedent were to survive the retirement date, his beneficiary would receive \$30,000; if not, the beneficiary would receive only \$14,000 and defendant would profit by the difference. Decedent believed he would live for an indefinite time. The record indicates, however, that defendant knew the decedent was grossly mistaken. In these circumstances, when defendant conferred with decedent about designating a retirement date, defendant acquiesced in decedent's designating a date six weeks in the future. Death occurred prior thereto. The question presented is whether material issues of fact existed—on plaintiff beneficiary's claim that defendant breached its duties to decedent—and, therefore, whether the court below erred in granting summary judgment to defendant.

(iii)

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(iv)

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)	21
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OTHER AUTHORITIES:

American Law Institute <i>Restatement of Trusts</i> (2d), Section 170	15
American Law Institute <i>Restatement of Torts</i> , Section 551 (2).	16
Bogert, <i>Trusts & Trustees</i> (2d ed. 1960), Section 544	16

*Cases chiefly relied on.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,247

EDITH S. MARKUS,

Appellant,

v.

PENN MUTUAL LIFE INSURANCE CO.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia granting summary judgment to defendant. The jurisdiction of this Court is conferred by 28 U.S.C. Section 1291. The jurisdiction of the court below was based on D.C. Code (1961) Section 11-306.

STATEMENT OF THE CASE

Introduction. — Samuel J. Sugar died of cancer on November 8, 1962. He had been an agent of defendant Company for 31 years and for more than 21 years he had made periodic contributions to defendant's Retirement Plan (J.A. 23, 27). After consulting with defendant Company, Mr. Sugar on October 1, 1962 chose November 11 as the date of retirement. Mr. Sugar was in the terminal stage of cancer on October 1 and the Company — though not Mr. Sugar — knew that death was imminent. The record indicates that on October 1 Mr. Sugar believed he would live indefinitely, and that the Company knew or should have known this. Defendant Company contends that since death occurred prior to retirement, the Company was liable only for refund of Mr. Sugar's contributions to the Plan with 3% interest, approximately \$14,000, which it has paid to the estate. If defendant Company had induced Mr. Sugar to retire on October 1, his beneficiary would be entitled to receive the Company's contributions to the Plan as well as decedent's, or a total of approximately \$30,000. Defendant Company broached the subject of early retirement "in view of his condition" but permitted Mr. Sugar to select the November 11 date (J.A. 18, 108).

Plaintiff, whom Mr. Sugar named on October 1 as his beneficiary under the Retirement Plan, contended in her complaint that defendant Company had full knowledge on October 1, 1962 that Mr. Sugar was in the terminal stage of cancer and that his death was imminent, and that the Company knew that Mr. Sugar did not realize his death was imminent but on the contrary believed he would live for an indefinite period (J.A. 2). Plaintiff alleged that defendant owed a duty of using its utmost efforts to induce Mr. Sugar to make his retirement effective immediately, and that the Company breached that duty (J.A. 2-3).

The court below "with some regret" granted defendant's motion for summary judgment. (J.A. 45, 47) ¹

The Retirement Plan. — Mr. Sugar had been an agent of defendant Penn Mutual since 1931, and at the time he began to suffer from cancer he was a highly productive agent in the D. C. area (J.A. 9, 79). He had been a member of the Company's retirement plan since 1941, and during this period he had made regular and substantial retirement contributions (J.A. 23, 27). Normal retirement was at age 65, but Mr. Sugar (aged 59), by reason of his lengthy membership, could elect early retirement (Art. VI, J.A. 40, 57). The Plan provided that the member agents were to make periodic contributions and the Company also would make contributions (J.A. 37, 38). If a member died before retirement the Company would pay only the member's contributions plus three per cent interest (J.A. 42). But if death occurred after the retirement date, benefits would include the Company's own contributions (J.A. 6, 27, 39). In the instant case, the Company takes the position that only \$14,000 was due, whereas if Mr. Sugar had lived until November 11, or if he had selected a retirement date on or before November 8, 1962, approximately \$30,000 would be payable (J.A. 6, 16, 22-23, 27).

The amount of retirement benefit payable if Mr. Sugar lived until November 11 was only "a matter of pennies" higher than the benefit payable if he retired effective October 1 (J.A. 91). Thus when Mr. Sugar acted on October 1, he gambled \$16,000 against a "matter of pennies" that he would live for at least six weeks. The Company, on the other hand, risked only pennies against a profit of \$16,000, by the selection of November 11. Indeed, when Mr. Sugar made his final contribution payment to the Plan in the latter part of October, his retire-

¹ Defendant Company filed a third-party action against the executors of Mr. Sugar's estate in which it sought judgment for amounts that might be awarded to plaintiff on her claim, to the extent of the \$14,000 the Company had paid to the executors (J.A. 6).

ment benefits became fixed, and he had \$16,000 to lose, and not even "a matter of pennies" to gain, by permitting his retirement date to remain at November 11 (J.A. 89).

Decedent's Physical Decline. - The disease had its onset in July 1961 and thereafter the cancer continued its inexorable progress until death occurred. In October 1961 Mr. Sugar underwent surgery in New York; the parotid gland and the cervical lymph glands and adjacent tissues were excised (J.A. 51, 52). The surgery involved extensive removal of tissues in the facial and neck areas, and left Mr. Sugar with gross scars (J.A. 81). Immediately after the operation the surgeon gave his opinion to Marvin L. Sugar, decedent's son, that Mr. Sugar could not be expected to live more than six months to a year (J.A. 71). The doctor did not so inform the patient (J.A. 70, 71).

By March 1, 1962 the cancer had metastasized to the esophagus and the spine. Mr. Sugar found it difficult to speak on the telephone and the lesion of the spine affected his left arm so that it had to be carried in a sling. X-ray treatments were given daily. Soon afterwards one of the cranial nerves was affected and Mr. Sugar began to see double. (J.A. 31).

During this period Wayne Dorman, defendant Company's general agent and chief representative in the D. C. area, saw Mr. Sugar from time to time and was aware of the decline in his condition (J.A. 80, 83, 84).

In August 1962 defendant Company rated Mr. Sugar as totally disabled, for purpose of waiver of premiums on certain life insurance policies (J.A. 11). This required a finding of total disability for at least four to six months (J.A. 109). On the application for disability benefits, documentary evidence was submitted to the Company, which gave full knowledge as to Mr. Sugar's condition. A memorandum dated August 2, 1962 gave the history of the disease and described Mr. Sugar's condition as follows (J.A. 31):

SUGAR AND SUGAR
INSURANCE

August 2, 1962

MEMORANDUM

Re: Illness of Samuel J. Sugar
Policies 2631398 & 2638336

Group Insurance Claim #11-002466

Operated on for removal of Parotid Gland tumor about October 25, 1961. Gland, 7th cranial nerve, lymph glands, and neck mastoid muscle - plus other items removed. In hospital for about 2-1/2 weeks, then at home for about 3-1/2 weeks before visiting the office. Came into the office for a few hours daily thereafter until around March 1st when trouble developed in left arm and esophagus. Visited orthopedic doctor, physiotherapist doctor, throat doctor, surgeon who did the original operating in New York, and was referred to local cancer man, Dr. T. Crandall Alford. X-Ray pictures indicated tumor cells still present and X-Ray treatments were begun by a Dr. Ralph Caulk to the cervical spine for treatment to the arm that was carried in a sling for a few months. These lasted over one month and then X-Ray treatments began for stricture in the esophagus, after being in the hospital where a chest doctor attempted to get down in the throat but could not do so because of the angle of the left jaw. So, X-Ray treatments to the esophagus began. While these treatments were going on vision in the left eye became affected and Mr. Sugar began seeing double. The eye physician indicated something wrong with the 6th cranial nerve controlling the muscle of the left eye. Naturally, with the left arm and eye affected, Mr. Sugar cannot drive an automobile, and with the esophagus trouble cannot do much talking and cannot accept telephone calls. This has been true since March.

Mr. Sugar's routine is to go for an X-Ray treatment every morning at around 11:A.M., then go to his office where he looks at the mail, then has lunch, then takes a nap, then hangs around the office for another hour or two in order to keep himself from having too much idle time.

Contrary to defendant's assertion in its motion for summary judgment (J.A. 24), there is no evidence Mr. Sugar ever saw this memorandum (J.A. 68-69).

Also submitted to the Company at this time was Attending Physician's Statement of Disability dated August 11, 1962. This stated "double vision"; "paralysis left 6th cranial nerve"; "Apr. 16, 1962 - X-ray—numerous foci in cervical spine (METASTASIS)"; diagnosis: "adenocarcinoma left parotid gland with invasion adjacent muscle & lymph nodes"; degree of disability, complete (J.A. 53).

On August 13 Dr. Bowen, associate medical director of defendant Company, had telephone conversations with decedent and with Dr. Simpson, one of Mr. Sugar's physicians. Fortunately, Dr. Bowen recorded these conversations in a memorandum, which reveals graphically how advanced the cancer had become and how Mr. Sugar did "not have too much longer" (J.A. 13, 49, 95, 96-97):

I called Sam Sugar himself concerning what happened, and Sam, incidentally, sounded terrible over the phone, as if he could hardly speak. Sam said that he goes to the Doctor about every 5 weeks to have eye lashes removed from his eyes. The Doctor pulls them out.

I then called Dr. Simpson and he confirmed this. The Doctor stated that Sam is in very poor physical condition and he does not feel that he should do anything more than to try and make him comfortable as he does

not have too much longer. He stated that the eye lashes are merely plucked out with tweezers and not cut.

/s/ John R. Bowen, M.D.
JOHN R. BOWEN, M.D.
ASSOCIATE MEDICAL DIRECTOR

Dr. Bowen testified at his deposition that the sound of Mr. Sugar's voice on the telephone was "enough to alarm" him as a doctor; that the cancer had caused Mr. Sugar's eye to swell, thus causing his eyelashes to grow inward towards the eyeball, and that this was a serious condition; that the double vision was caused by invasive cancer; that "this man was in danger of an early demise . . ." (J.A. 97-98, 103, 104).

Mr. Sugar's condition continued to worsen. On September 26, 1962 Dorman's office wrote to the home office of the Company that "Mr. Sugar is home now and house confined" (J.A. 54). The Company's evidence is that in September the Company through Dorman, its general agent, broached with Mr. Sugar the subject of his early retirement "in view of his condition" (J.A. 18, 108). In that month Dorman came to Mr. Sugar's apartment on at least two occasions and talked to him on this subject (J.A. 85-87). Mr. Sugar remarked to Dorman that his illness was "giving me hell" (J.A. 77). Mr. Sugar's double vision made it difficult for him to read, and Dorman kindly brought him a reading stand to help him (JA. 72, 77).

The October 1 election to retire. -- On October 1 Dorman brought to Mr. Sugar's apartment two retirement forms prepared at the home office of the Company in Philadelphia. On that date these forms, which made retirement effective November 11 and designated plaintiff as beneficiary were signed by Mr. Sugar. (J.A. 87-88).

Dorman is the only witness with personal knowledge of the October 1 conference. He testified that he suggested immediate retirement (J.A. 87) because Mr. Sugar's condition was such that he might die before

November 11 (J.A. 93). This testimony, of course, is not conclusive on plaintiff, especially because, as shown *infra*, Point II, there are issues of credibility. Dorman could not recall the precise language used in this conversation (J.A. 93) and in any event, assuming he sought to induce Mr. Sugar to elect immediate retirement, the question is open as to whether he effectively sought to influence Mr. Sugar or simply made a suggestion in passing. Dorman testified, "I *suggested* that he go ahead and make it right now." (J.A. 87) (Emphasis supplied) Dorman could not recall whether or not Mr. Sugar was able to read the documents that he executed on October 1 (J.A. 93). He admitted that he did not tell Mr. Sugar that when his contribution to the Retirement Plan was made late in October, he could retire at that time with the same benefits that would apply to a retirement date of November 11 (J.A. 89).

Mr. Sugar's unawareness of the imminence of death. -- Defendant Company in its motion for summary judgment asserted that Mr. Sugar "knew only too clearly about his condition", and referred to the memorandum of August 2, 1962, plaintiff's Exhibit 3 for *id.* (J.A. 24, 52), and to his physician's report of August 11, 1962, plaintiff's Exhibit 4 for *id.* (J.A. 53).² At the hearing on the motion counsel for defendant also relied on certain testimony in plaintiff's deposition which suggests that Mr. Sugar may have been aware that he had cancer of the parotid gland (J.A. 65).

However, the assertion that Mr. Sugar was aware of his life expectancy cannot be supported. There is no evidence whatever that Mr. Sugar saw the memorandum of August 2, 1962 (See J.A. 68-69), or that he saw his doctor's statement of August 11, 1962. Indeed, apart from an ambiguous item in plaintiff's testimony referred to above (J.A. 65), there is no evidence that Mr. Sugar even knew that he had cancer. None of the forms he executed as to his physical condition stated that he had

² The physician was Dr. Samuel J. N. Sugar, a cousin of decedent.

cancer (J.A. 108-109). The record affirmatively shows that Mr. Sugar's relatives did not speak to him about his life expectancy (J.A. 69, 72, 75), and that while his doctors informed Mr. Sugar's son, Marvin Sugar, regarding life expectancy, they did not inform the dying man (J.A. 70, 71, 77). Indeed, "they attempted as best they could to give him hope..." (J.A. 71).

The record rather clearly shows that Mr. Sugar did not have accurate information as to life expectancy, and that on October 1, 1962 he thought that he had an indefinite time to live.

Defendant Company knew or should have known that Mr. Sugar had a gross misconception as to his life expectancy. See *infra*, Point 1.

STATEMENT OF POINTS

1. Under the law of torts and the law relating to fiduciaries, plaintiff established *prima facie* that defendant owed a duty to use its utmost efforts to induce Mr. Sugar to retire immediately.

2. The court erred in granting summary judgment because material issues of fact were presented: whether defendant knew or had reason to know that Mr. Sugar mistakenly believed he would live indefinitely, and whether it used its utmost efforts to induce him to retire immediately.

3. Plaintiff beneficiary established *prima facie* that she is entitled to reformation. At the least, issues of fact are presented as to whether Mr. Sugar was mistaken in believing he would live indefinitely, and whether defendant's conduct in the circumstances was inequitable.

SUMMARY OF ARGUMENT

1. The record shows that defendant knew that Mr. Sugar was in the terminal stage of cancer and that his life expectancy was virtually nil. Defendant knew that by the terms of its retirement plan, if Mr.

Sugar died prior to November 11, defendant would profit and Mr. Sugar's beneficiary would lose, in the amount of \$16,000. The record indicates that Mr. Sugar thought he would live for an indefinite period, and that defendant knew or should have known that he acted under this misapprehension in selecting his retirement date. Defendant broached the subject of early retirement, and the law of torts imposed on defendant the duty to use care in advising and guiding Mr. Sugar. Moreover, defendant acted as a fiduciary in the transaction, and therefore had a duty of acting fairly, in order to protect his interests. In the circumstances, plaintiff has established *prima facie* that defendant was under a duty to use its utmost efforts to induce Mr. Sugar to retire as of October 1, 1962.

2. The following issues of material fact are presented: (a) whether the parties had unequal knowledge as to Mr. Sugar's life expectancy on October 1, 1962; (b) whether Mr. Sugar believed that he would live for an indefinite period; (c) whether the Company knew or had reason to know that he was laboring under this misapprehension; (d) whether defendant used adequate efforts to induce him to choose immediate retirement. Because these issues of material fact exist, the Court below erred in granting summary judgment.

3. In granting summary judgment, the court below seems to have relied on the testimony of defendant's representative Dorman, as establishing that the Company sought to induce Mr. Sugar to choose immediate retirement on October 1. Dorman's testimony is subject to attack on credibility. In any event, plaintiff is entitled to a trial so that Dorman's demeanor and his credibility may be judged by the trier of fact.

4. The court erred in granting summary judgment, because plaintiff is entitled to a trial on the issues arising from her claim of reformation — including the issues of Mr. Sugar's mistake as to life expect-

tancy, of defendant's knowledge as to such mistake, and of defendant's inequitable conduct in permitting Mr. Sugar to gamble \$16,000 against pennies that he would live for six weeks, although defendant knew that his life expectancy was virtually nil.

ARGUMENT

Point I

Because defendant knew that Mr. Sugar's death was imminent, and knew or had reason to know that Mr. Sugar was mistaken on this subject, plaintiff established prima facie that defendant had a duty of using its utmost efforts to induce Mr. Sugar to retire immediately, rather than permit him to take a foolish risk from which defendant derived substantial profit.

It is reasonably well established that defendant Company knew on October 1 that Mr. Sugar's death was imminent. At the motion proceedings below defendant did not question that it had such knowledge (See J.A. 58). Defendant's associate medical director, Dr. Bowen, on August 13 ascertained from Mr. Sugar's physician that "he does not have too much longer" (J.A. 13, 99). Dr. Bowen believed that Mr. Sugar "was in danger of an early demise." (J.A. 104). Defendant knew that in September Mr. Sugar had further declined, for he was "home now and house confined" (J.A. 54). On October 1 Dorman felt that Mr. Sugar should retire immediately because his condition was such that he might die before November 11:

"Q. The reason why it was preferable to take the earlier date was that his condition was such that he might die before the later date arrived?

"A. Yes. I felt that way." (J.A. 93)

Defendant also knew, or should have known, that Mr. Sugar did not realize that death was imminent. As the court below recognized, a person dying of illness ordinarily will reject the thought that death is near:

"THE COURT: Mr. Ballard, I can understand your difficulty with the matter that you have to present to the Court, knowing you as I do. But all of us have had experience with persons who have been similarly situated. I recall one case of an eminent physician at Johns Hopkins, who was one of their experts on cancer. He himself was suffering from cancer. He just couldn't bring himself to realize that he wouldn't be able to be there. But he didn't. And he died, just as his doctors told him he would. We didn't have a situation like this, which taxes the imagination and sympathy of people who have to deal with it. I make this observation because through my father I was very familiar with the facts and circumstances of that case, and with my father I went to Johns Hopkins to see Dr. George Walker when he was dying. Eminent physicians at Johns Hopkins mentioned to my father and me that this was not an unusual situation." (J.A. 59)

* * *

"THE COURT: People faced with this type of terminal illness are not always rational in their decisions. They frequently are quite irrational in their decisions." (J.A. 60)

Two factors establish that defendant Company should have known Mr. Sugar refused to face the fact that he was dying but instead thought he had an indefinite time to live. First: It is a striking fact that defendant Company raised the question of early retirement, and that Mr. Sugar did not. Mr. Sugar was familiar with the Retirement Plan. He could not have thought that death was close. For if he had, he would have taken steps to avoid the heavy forfeiture his beneficiary would suffer if death occurred prior to the retirement date. Mr. Sugar was trained to think in terms of protection and elementary prudence. His failure to act on retirement is eloquent testimony that he was mistaken, that he thought he would live for an indefinite period. Defendant Com-

pany thus knew or had good reason to know that Mr. Sugar, like others in the terminal stages of cancer, refused to face the thought of early death.

Second: Mr. Sugar selected a retirement date six weeks in the future. He therefore took the risk that his beneficiary would lose \$16,000 if he died prior to November 11. On the other side of this gigantic gamble, defendant Company admits that he had "just pennies" to gain by delaying his retirement, and that once he made the retirement contribution later in October, Mr. Sugar had everything to lose and nothing to gain by waiting for retirement until November 11. (J.A. 89, 110). The inescapable inference is that Mr. Sugar took this gamble because he thought his life expectancy was indefinite and therefore felt that the risk was minimal. If he had known what the Company knew as to his life expectancy, he would surely have retired immediately. The Company through Dorman must have known that Mr. Sugar had this erroneous notion as to life expectancy and that he was acting on the basis of a false view as to life expectancy.

Plaintiff established a *prima facie* case of liability against the Company, on two separate doctrines: 1) the tort rule that one who undertakes to advise must do so carefully, and 2) the doctrine that a fiduciary who enters into a transaction with his principal owes the duty of extreme good faith to protect the latter's interests.

Tort Liability. In the circumstances defendant Company had a duty to guide and advise Mr. Sugar so that his decision on retirement date would be a rational and informed decision based on his actual life expectancy. Defendant Company had assumed the task of discussing with Mr. Sugar the question of early retirement. It owed him the duty of utmost care to insure that he would be able to make an intelligent

decision, especially because the Company would profit if Mr. Sugar by reason of false assumptions made a foolish decision.³

Gediman v. Anheuser Busch, Inc., 299 F.2d 537, 543-546 (C.A. 2, 1962) is clear authority for the view that defendant Company had such a duty. There a retired executive sought advice from the Company as to electing to take cash distribution of retirement benefits at a later date. The company was held liable in tort because it failed to warn that such election would reduce enormously the death benefit if death occurred prior to that date. The court held that "he should have been plainly warned" as to "the risks incident to death. . ." (p. 546)

"When the action is on the contract, defendant may properly insist that the boundaries of its obligation are marked out by the technical terms used, whether Barsi understood them or not; but when Barsi sought advice and defendant gave this, it was bound to take account of the frailties of human understanding. By his letter of August 31, 1956, Barsi placed himself in defendant's hands. Defendant was not required to accept him; it could have suggested he consult his own advisers. Having undertaken to advise, defendant was bound to advise clearly."⁴

³ Defendant inferentially recognized that it owed Mr. Sugar a duty to guide and advise him. Dorman testified that he felt that Mr. Sugar's "condition was such that he might die before" November 11, and therefore "I suggested that he go ahead and make it right now," i.e., retire on October 1 (J.A. 87, 93). Plaintiff does not, of course, concede that this suggestion, if it occurred, satisfied defendant's duty.

⁴ *Gediman* relied on the doctrine stated by Judge Cardozo in the leading case of *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922): "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

The Municipal Court of Appeals for the District of Columbia applied that rule in *Robitscher v. United Clay Products Co.*, 143 A.2d 99 (1958). The court held that defendant who furnished a layout for heating and air-conditioning was liable for negligence in preparation of the layout, even though he acted gratuitously.

"...one who undertakes to perform a service for another has the duty of exercising care and is liable for his failure to do so even though his undertaking was gratuitous."

Gediman is a *fortiori* authority, for the facts in the instant case are stronger. In *Gediman* the risk was brought to decedent's attention, but he was not fully informed. In the instant case defendant Company knew that Mr. Sugar had a gross misconception as to the risk.

Defendant Company could not stand idly by while Mr. Sugar let his valuable retirement benefits go down the drain. Its duty was to insure that Mr. Sugar acted on an informed judgment. In the circumstances, that duty required defendant Company to do its utmost to induce him to retire without any delay.

Fiduciary Duty. Moreover, defendant Company owed Mr. Sugar the duties of a fiduciary, because of the relationship between them. In this jurisdiction those who administer a retirement or pension plan are regarded as fiduciaries. *Ruth v. Lewis*, 166 F.Supp. 346, 349 (D.C. D.C. 1958) ('In this case, plaintiff is in the position of a beneficiary of a noncharitable trust. . .') When Dorman discussed with Mr. Sugar the question of early retirement, and permitted him to make his election on October 1, defendant Company as a fiduciary in effect entered into a business transaction with its cestui. It therefore owed to Mr. Sugar the duty of dealing fairly with him in order to protect his interests. Defendant had an obvious conflict of interest: it owed Mr. Sugar the duty of protecting him by seeing that he retired immediately, an act which would cost defendant \$16,000; its own interest was served when Mr. Sugar took a foolish risk by postponing retirement, a risk that resulted in a \$16,000 profit to defendant. The \$16,000 went directly to defendant, not into a fund for benefit of other retirees.

Section 170 of the American Law Institute *Restatement of Trusts* (2d) states:

§170. Duty of Loyalty

* * *

"(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the

beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know."

Bogert, *Trusts & Trustees* (2d ed. 1960) states, Section 544, pp. 594, 599:

"The courts permit such transactions [contracts between trustee and principal], but place upon the fiduciary the duty of the utmost frankness and fair play.

* * *

"This duty to make full disclosure and otherwise to exhibit extreme good faith runs through the whole law of fiduciary and confidential relations."

See also American Law Institute *Restatement of Torts*, Section 551(2).

This Court has applied the foregoing principles. *Earll v. Picken*, 72 App. D.C. 91, 113 F.2d 150 (1940); *Kosty v. Lewis*, 115 U.S. App. D.C. 343, 319 F.2d 744 (1963); *Sheridan v. Perpetual Building Association*, 112 U.S. App. D.C. 82, 84, 299 F.2d 463 (1962).

In *Earll v. Picken* the Court speaking through Justice Rutledge stated (72 App. D.C. at page 96):

"The foundation of the rule is the trustee's obligation of undivided loyalty to the trust. He cannot deal with it at arm's length or in the mores of the market place."

In *Sheridan v. Perpetual Building Association*, *supra*, the Court held, in banc:

"When it is shown that a fiduciary has conflicting interests, ancient principles require him to bear the burden of proving that he has been faithful to his trust."

Kosty v. Lewis, supra, is compelling authority because it enforced the rights of a member of a pension plan against those administering the plan. There the plaintiff was eligible for a pension under a pension plan because he had completed 20 years service, but he had not retired. Without notice, defendant pension fund trustees revised the pension plan and thus in effect terminated plaintiff's eligibility by requiring 20 years service in the past 30 years. This Court held that plaintiff was entitled to his pension because defendants had exceeded the "limitations of fundamental fairness" (115 U.S. App. D.C. at 348):

"These were, in our judgment, exceeded here by the failure of the Trustees to accord any notice or period of grace which would have afforded some reasonable possibility for an employee like appellant to have elected to retire and take the pension available immediately prior to the change."

See *Yurkovich v. Industrial Accident Board*, 132 Mont. 77, 314 P.2d 866, 869 (1957) (Compensation Board held to have duty of informing claimant that formal claim must be filed within one year).

Defendant could not stand by and permit Mr. Sugar to throw away his rights — to the Company's profit — because of his misconception as to life expectancy. As in *Kosty v. Lewis*, defendant owed Mr. Sugar the duty of dealing fairly with him in order to protect his interests. In the circumstances, "fundamental fairness" required defendant Company to use its utmost efforts to induce Mr. Sugar to retire immediately on October 1.

The record thus establishes a *prima facie* case of liability on the ground that defendant Company violated the duty it owed to decedent. Certainly defendant Company has not shown as a matter of law that it performed such duty.

Point II

Because material issues of fact exist, the court erred in granting summary judgment

Plaintiff's theory of liability involves certain issues of fact: 1) did defendant Company have knowledge that Mr. Sugar's death was imminent on October 1? 2) did defendant Company know or should it reasonably have known that Mr. Sugar was grossly mistaken as to life expectancy and that he believed he would live for an indefinite period? 3) did defendant Company use its utmost efforts to induce him to elect immediate retirement?

Defendant Company sought summary judgment on the ground that Mr. Sugar, as well as the Company, was aware of his condition, and that the Company therefore owed him no duty whatsoever. Thus, at the argument on the motion defendant contended that Mr. Sugar "knew the seriousness of his condition," and that there was no "unequal knowledge between these parties" (J.A. 65-66). The motion for summary judgment states: "There is, however, nothing whatever in the record to suggest that the Company knew any more, if as much, about Sugar's condition than he did; to the contrary, the record shows that he knew only too clearly about his condition. . ." (J.A. 24) To support this contention defendant cited the August 2 memorandum and the statement of Mr. Sugar's physician (J.A. 52, 53). But it does not appear that these documents, which gave knowledge to the Company that Mr. Sugar was in an advanced stage of cancer, ever came to the knowledge of Mr. Sugar (J.A. 68-69).⁵ The record therefore plainly presents, at the least, disputed issues of fact on the critical questions of whether Mr. Sugar was aware of his brief life expectancy and whether the Company

⁵ At the hearing on the motion for summary judgment defendant's counsel stated that Mr. Sugar forwarded the August 2 memorandum to the Company, thus indicating he knew its contents (J.A. 65). No evidence supports this assertion. See J.A. 68-69.

had superior knowledge in that respect. The court below resolved these material issues of fact in favor of defendant.

This the court could not properly do on motion for summary judgment.

"That one reasonably may surmise that the plaintiff is unlikely to prevail upon a trial, is not a sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." *Harl v. Acacia Mutual Life Ins. Co.*, 115 U.S. App. D.C. 166, 169, 317 F.2d 577 (1963), quoting *Sprague v. Vogt*, 150 F.2d 795, 801 (C.A. 8, 1945)

In cases where knowledge or intent or state of mind is material, this Court has repeatedly held that summary judgment should be denied. *Edwards v. Mazor Masterpieces, Inc.*, 111 U.S. App. D.C. 202, 204, 295 F.2d 547 (1961) (issues of knowledge by seller that folding bed was dangerous and that purchaser would not realize the danger); *Harl v. Acacia Mutual Life Ins. Co.*, *supra*, 115 U.S. App. D.C. 166, 317 F.2d 577 (1963) (waiver of a lapse provision through knowledge of late premium payments); *F. S. Bowen Electric Co., Inc. v. J. D. Hedin Construction Co., Inc.* 114 U.S. App. D.C. 361, 316 F.2d 362 (1963) (fraudulent intent); *Blow v. Ammerman*, 121 U.S. App. D.C. 351, 350 F.2d 729 (1965) (whether holder took note with knowledge of possible defense). See *Semaan v. Mumford*, 118 U.S. App. D.C. 282, 284, 335 F.2d 704 (1964). ("Since these facts would constitute an estoppel, it was error to deny him the opportunity of proving them.") The most recent decision in this category is *Weinberg v. Macy*, 360 F.2d 816 (June 16, 1966) (whether civil service employee knew or should have known that state court proceedings involved an arrest).

Thus, because the case presents material issues of fact — including those relating to the unequal knowledge of Mr. Sugar and the Com-

pany as to life expectancy — summary judgment was improperly granted. Moreover, the grant of summary judgment was error because defendant's case turned largely on the credibility of Dorman, the only witness of the discussions with Mr. Sugar that led to execution of the retirement forms. Dorman testified at his deposition that he sought to induce Mr. Sugar to retire immediately, on October 1.

On the motion for summary judgment defendant relied heavily on this testimony by Dorman. In its memorandum in support of the motion (at page 2) defendant stated, ". . . Penn Mutual urged him to select an earlier date." (See Record) At the argument on the motion counsel for defendant stated, ". . . Mr. Dorman says I urged him, I urged him to do it on the date when the various papers were being signed by him. . . But he simply refused to accept that suggestion" (J.A. 57-58).

But the court below could not properly accept Dorman's testimony as establishing defendant's contention of what occurred.

Dorman's credibility is open to question and is controverted by plaintiff. At his deposition Dorman sought to give the impression that in the Spring of 1962 Mr. Sugar was active in his insurance business, that "he and his son worked jointly on business," and that Dorman assumed that some of the work had been done by decedent (J.A. 82). His testimony also suggests that even in the Summer of 1962 Mr. Sugar was still active as an insurance agent (J.A. 83):

"Q. What about in the spring and summer of 1962? During that period he had virtually curtailed all business activities, had he not?

"A. I don't know. All I know is that the business he was doing through our office still carried his name on it, and we had a good volume of business throughout all of 1962."

However, on August 3, 1962 Dorman stated in a memorandum to defendant's home office that Mr. Sugar had been physically unable to work since the first of the year (J.A. 36-37):

'Since his son Marvin became associated with him some years ago, Mr. Sugar has been writing all his insurance business jointly with Marvin. To my knowledge, Sam has not been able to solicit the sale of life insurance this year. All of the business that has been submitted through our company has been written by his son Marvin.

"There is no question in my mind that Mr. Sugar is totally disabled in every sense of the word. . ."

Dorman's credibility is thus open to attack. Here the record indicates that he is a biased witness. This Court has held that even where the testimony of a witness is not denied, summary judgment should not be granted, where the demeanor of that witness at a trial might prove helpful to the opposing party. *Cellini v. Moss*, 98 U.S. App. D.C. 114, 232 F.2d 371 (1956); see *Whetzel v. Jess Fisher Management Co.*, 108 U.S. App. D.C. 385, 393, 282 F.2d 943 (1960). In *Cellini v. Moss* the trial court granted summary judgment on defendant's affidavit which tended to show that he was not guilty of negligence; plaintiff's deposition was taken but she was unable to throw light on the accident. This Court reversed and held:

"Summary judgment is a useful device for disposing of meritless tort claims. But since on the trial of this case plaintiff may be able to elicit from defendant facts which defendant had a duty to observe and plaintiff did not and which may prove plaintiff's case, and since defendant's demeanor on the stand in testifying on these matters may also lead to inferences favorable to plaintiff, we cannot conclude that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'." (98 U.S. App. D.C. at 116)

Cf. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962):

"We look at the record on summary judgment in the light most favorable to. . .the party opposing the motionIt is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."

Plaintiff is entitled to try the issue of whether Dorman sought to induce Mr. Sugar to retire immediately, and if he did, whether his efforts were reasonably adequate, or whether he simply made a passing suggestion. These issues should not be resolved against plaintiff on summary judgment. Plaintiff has a right to have the jury determine Dorman's credibility.

Point III

The remedy of reformation is available

On October 1 Mr. Sugar executed two documents: in one, he chose November 11 as his retirement date, and in the other, he designated plaintiff, his sister, as beneficiary, to whom "any payments due after my death" were to be paid (J.A. 28, 29). In order to carry out Mr. Sugar's intention, plaintiff maintains, these documents should be reformed. Mr. Sugar executed them when he was under a gross misapprehension as to his life expectancy. If he had not labored under that mistake, he would have retired immediately, effective on October 1, 1962. The result of reformation would be that at the time of his death his retirement was effective and the designation of plaintiff as beneficiary was also effective.

Reformation is available where there is mistake by one party and inequitable conduct by the other. *Hawkins v. Fradkin*, 85 U.S. App. D.C. 310, 178 F.2d 705 (1949).

"The mistake need not be mutual. A mistake by one party accompanied by fraud or inequitable conduct on the part of the other will, if clearly proved, justify reformation."

When defendant Company permitted Mr. Sugar to make his senseless gamble, defendant Company knew or should have known that Mr. Sugar was laboring under a mistake. The Company risked nothing and stood to profit \$16,000 by his mistake. Defendant Company's conduct was "inequitable" within the meaning of *Hawkins v. Fradkin*. Indeed, its conduct was far more inequitable than that of the defendant in that case. There the parties were businessmen dealing at arms length and defendant sought merely to rely on the doctrine that an agreement to sell land is merged in the deed.

Plaintiff is entitled to a trial on her reformation claim, i.e., on the material issues of fact such as mistake, unequal knowledge of the parties, and inequitable conduct of defendant.

Respectfully submitted,

STANLEY KLAVAN

J. H. KRUG

Attorneys for Appellant

Of Counsel:

Hilmer, Klavan and Krug

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

NO. 20,247

FILED SEP 27 1966

Nathan J. Paulson
CLERK

EDITH S. MARKUS,

Appellant,

v.

PENN MUTUAL LIFE INSURANCE CO.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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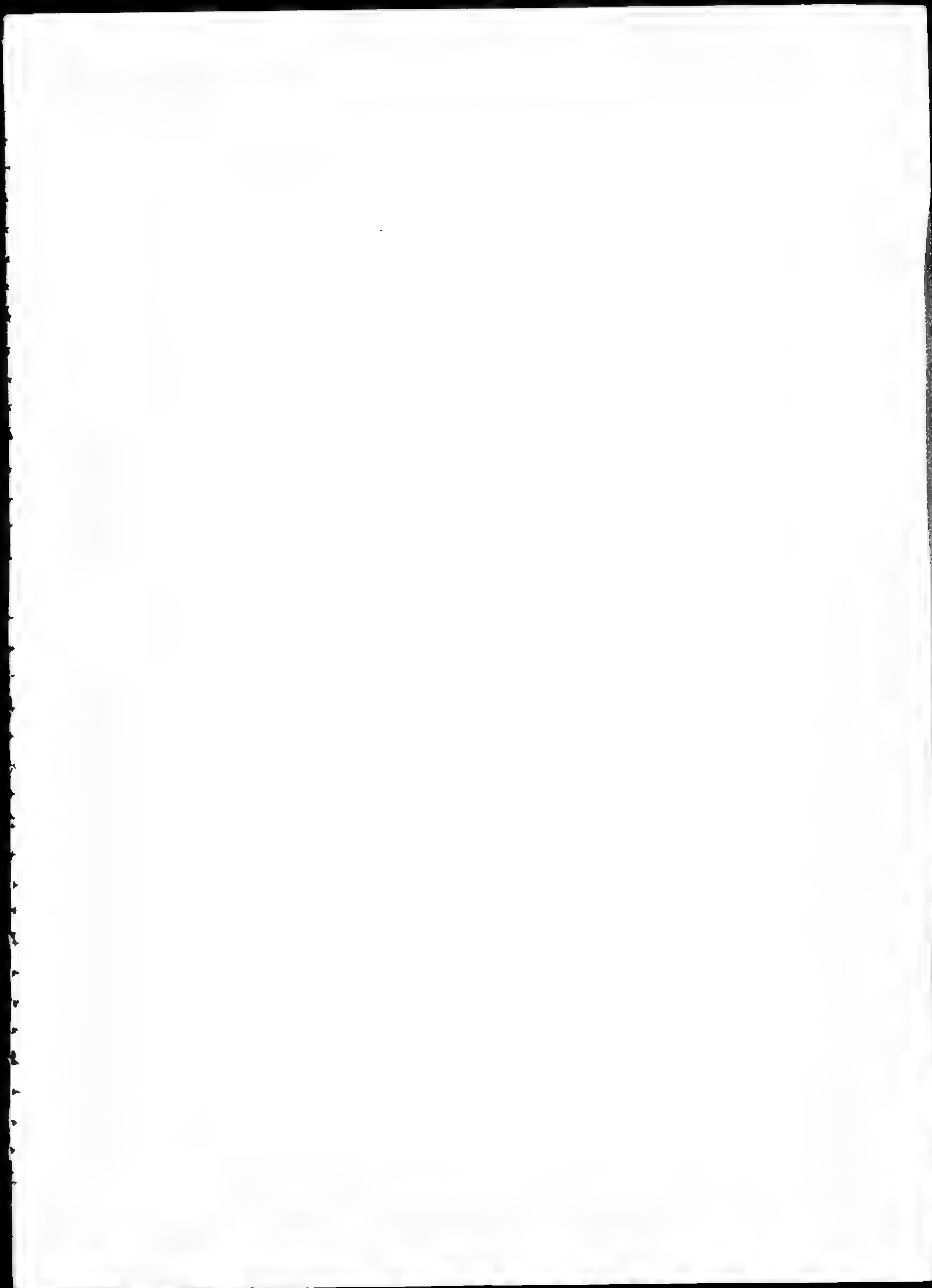
STANLEY KLAVAN
J. H. KRUG

839 - 17th Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant

Of Counsel:

Hilmer, Klavan & Krug



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,247

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

1. Appellee's Brief is wholly silent on the showing made in Appellant's Brief that the parties had unequal knowledge as to life expectancy when Mr. Sugar on October 1 selected a retirement date six weeks later. As set forth in our Brief, the record shows that on October 1 the Company believed "that his condition was such that he might die before the later date arrived" (J.A. 93; Brief, p. 11) But Mr. Sugar did not realize that death was imminent; he thought he had an indefinite time to live

(Appellant's Brief, pp. 8-9, 12-13). As Judge Gasch recognized, a person suffering from a terminal illness often refuses to face the fact that death is near (J.A. pp. 59-60; Appellant's Brief, pp. 11-12). Since the Company knew that death was imminent, and knew or should have known that Mr. Sugar was grossly mistaken as to life expectancy, our Brief showed that the Company had a duty to do its utmost to induce Mr. Sugar to retire without delay. (pp. 13-17, 18-19) Appellee's Brief is silent on this matter. It simply makes the bald assertion that there was a "clear absence of any sort of 'duty' on the Company . . ." (p. 9).

2. Appellee seeks only to establish that Mr. Sugar knew he had cancer, claiming that he knew the contents of the August 2 memorandum. Appellee asserts that Mr. Sugar "knew only too clearly about his condition" and claims that he himself delivered the typewritten memorandum of August 2 to appellee's general agent, Dorman. Appellee now attaches as "Exhibit A" to its Brief a note in the handwriting of Mr. Sugar and asserts that this note accompanied the memorandum. (Brief, pp. 3-4, Footnote 1) However, as shown in our Brief, pages 6, 18, there is no record support for this assertion. At the deposition of Marvin Sugar, the asserted attachment of the written note to the memorandum was not established, although the precise issue was raised (J.A. 68-69). At the later deposition of Dorman, to whom appellee now asserts both documents were simultaneously delivered by Mr. Sugar, no effort whatever was made to establish such assertion.

In any event, even if Mr. Sugar were shown to have had knowledge as to the contents of the August 2 memorandum, i.e., knowledge that he had cancer, that would not be dispositive. The record shows that on October 1 he did not realize that death was imminent, but thought he had an indefinite time to live. (Appellant's Brief, pp. 8-9, 12-13)

3. In its Brief, for the first time, appellee denies that it received a "profit" of \$16,000 when Mr. Sugar's absurd gamble failed. In the motion proceedings below, when appellant contended that appellee reaped such a

profit, appellee took no issue on this point. (See J.A. 62, 56-60, 65-66; Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, p. 6.) Appellee's Brief (p. 8) now claims that it received no "profit," stating that the \$16,000 did not go into its general funds, but remained in the retirement plan reserve, to which the Company was obliged to make "balancing" contributions. But this very statement is an admission that the Company profited, for its obligation to make "balancing" contributions was reduced by \$16,000, when Mr. Sugar chose November 11 for his retirement date and died on November 8. The reserve was richer by \$16,000 and the Company's obligation to contribute to the reserve was decreased by that amount. At the very least, appellee has raised a new issue of material fact. Whether or not the Company profited by the \$16,000 is, of course, highly material to plaintiff's theories of recovery, both under tort liability and under the law of fiduciary duties. (Appellant's Brief, pp. 13-17)

Respectfully submitted,

STANLEY KLAVAN

J. H. KRUG

Attorneys for Appellant

Of Counsel:

Hilmer, Klavan and Krug

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20247

EDITH S. MARKUS, *Appellant*

v.

PENN MUTUAL LIFE INSURANCE Co., *Appellee*

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FREDERICK A. BALLARD
912 American Security
Building
Washington, D. C. 20005

FILED SEP 12 1966

Nathan G. Harrison
CLERK

JOHN L. ESTERHAI
Penn Mutual Life
Insurance Co.
Independence Square
Philadelphia, Pennsylvania

Attorneys for Appellee

September 12, 1966

QUESTION PRESENTED

In the opinion of appellee, the question is whether defendant was under a duty to record one of its agents as retired (for purposes of defendant's retirement plan for its agents) as of a date earlier than that designated by the agent in accordance with the provisions of the plan, where the agent was an expert on such plans and was, though seriously ill, not incompetent.

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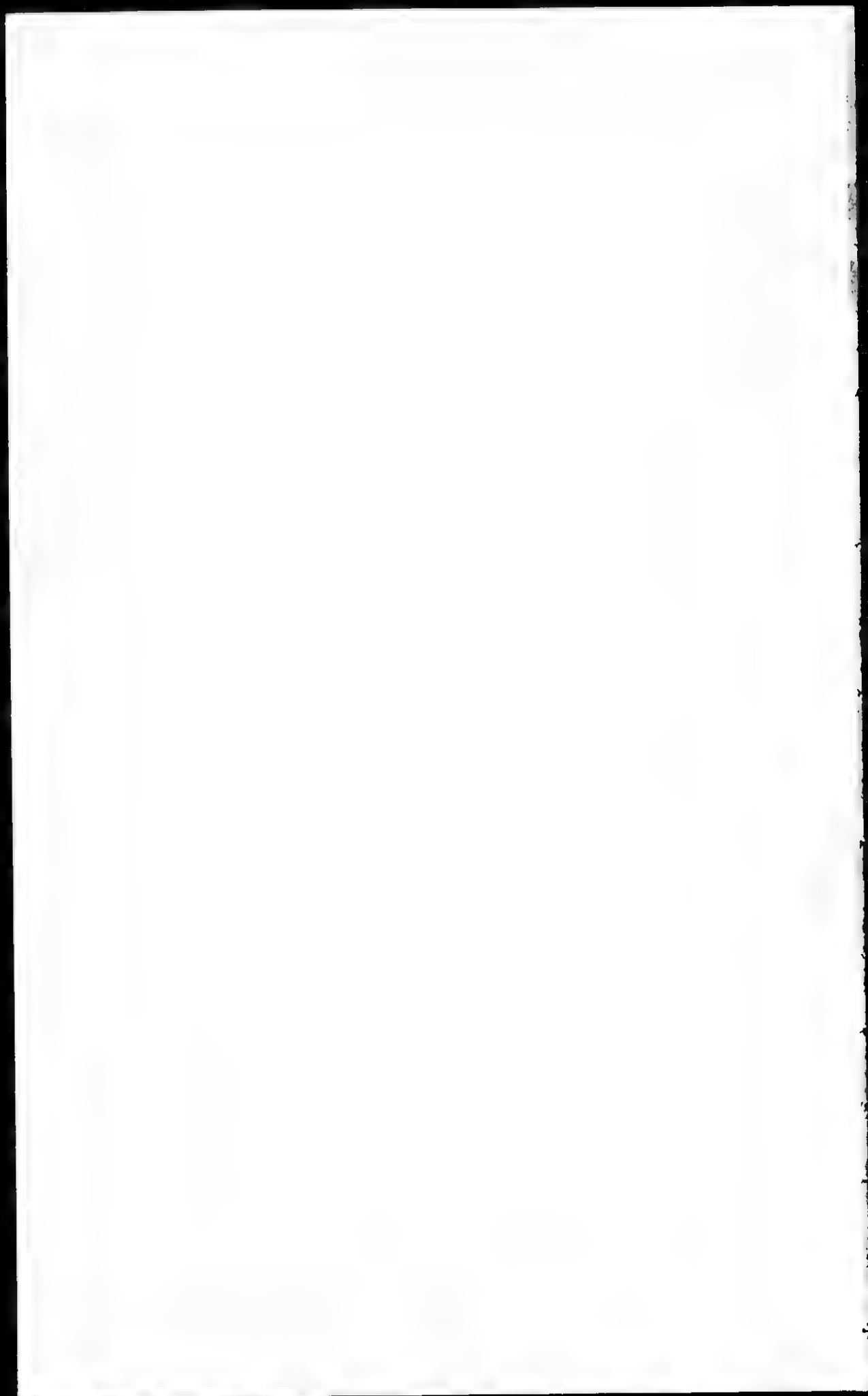
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20247

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Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an action for (a) reformation of an "Election of Annuity" made by Samuel J. Sugar, a deceased agent of defendant, under defendant's retirement plan for its agents, (b) estoppel of defendant from denying that the deceased Sugar retired on October 1, 1962 (the date he made the election of annuity), and (c) damages in the amount of \$30,000 (the approximate amount of the total payments which would have been paid to plaintiff, as Sugar's

designated beneficiary, if he had lived until his retirement date, when the beneficiary's rights would have accrued).

Defendant's answer (J.A. 4) denied all allegations of substance of the complaint. The record contains depositions of the plaintiff, Edith S. Markus; Marvin L. Sugar, son of the deceased, Samuel J. Sugar; Wayne E. Dorman, the local General Agent of defendant; Wilkins S. Thomson, Assistant Vice President of defendant; and of Dr. John R. Bowen, Associate Medical Director of defendant. Also in the record are plaintiff's interrogatories (J.A. 9) and defendant's answers thereto. A Third-Party Complaint (J.A. 6) was filed by defendant against I. Lewis Markus, husband of plaintiff, and Marvin L. Sugar, son of Samuel J. Sugar, in their capacities as executors of the estate of Samuel J. Sugar, deceased; defendant had already paid to the executors fourteen thousand seventy-nine dollars and eighty-one cents (\$14,079.81) on December 17, 1962, which was the total of Sugar's personal contributions to the Retirement Plan, and the Third-Party Complaint was filed because if plaintiff were to recover the \$30,000 sought by her from defendant, defendant would be entitled to recover the above sum already paid to the executors.

The complaint (J.A. 1) alleged that: Plaintiff, Edith S. Markus, sister of Samuel J. Sugar, was the beneficiary named by Sugar in his Election of Annuity under the agents' retirement plan; on October 1, 1961, Sugar was suffering from cancer and did not know that he had a life expectancy of six months to a year; on March 1, 1962, Sugar retired "as a Full-Time Agency Field Representative and defendant was well aware of his said retirement and consented thereto"; on September 1, 1962, Sugar informed defendant of his desire "to formalize his retirement" and to elect the option for a deferred paid-up annuity with plaintiff Markus to be his beneficiary thereunder; defendant knew Sugar's death was imminent and Sugar did not know but believed he would live an indefinite length of time; defendant owed the duty of designating Sugar's status on

its records "as a retired employee and accord to him the full benefits accruing to members upon retirement"; defendant owed a duty "to induce Sugar to make his retirement effective at once but instead, in violation of this duty, advised Sugar as to the benefits which would be paid in the event of his retirement as of the 11th day of November, 1962, at which time he would be 60 years of age"; Sugar, on October 1, 1962, acting on advice of defendant fixed November 11, 1962, as his retirement date; it was the duty of defendant to make Sugar's retirement effective as of October 1, 1962, and Sugar died on November 8, 1962.

The action of Samuel J. Sugar in fixing his retirement date, referred to in the complaint, was taken by way of execution by Sugar of the Company's prescribed forms for electing early retirement and for fixing the date thereof. These forms were identified, on deposition, by Marvin L. Sugar, Sugar's son and business partner, and are marked, respectively, defendant's Exhibits 2 and 3 for identification (J.A. 28, 29). Sugar was an expert on retirement plans, including insured type plans like the Penn Mutual's (J.A. 91-92).

Therefore, in substance plaintiff alleged that although on October 1, 1962, Sugar elected November 11, 1962, as his date of retirement under the retirement plan, the Penn Mutual nevertheless had a legal duty to disregard this election and make his retirement effective as of another date, October 1, 1962. There being no allegation of fraud, misrepresentation, or incompetency, the basis for this claim appears to be that the Company knew but Sugar did not that his death was imminent (Compl't. par. 7, J.A. 2); and, apparently, that the Company thus had a duty to *force* him to elect a date of retirement earlier than he wished. There is, however, nothing in the record to suggest that the Company knew any more, if as much, about Sugar's condition than he did; to the contrary, the record shows that he knew only too clearly about his condition, see his memorandum

of August 2, 1962, to the Company as to his condition (Deft's Exh. 4, identified on deposition of Marvin L. Sugar, J.A. 31, 52)¹; see plaintiff's admission on her deposition that Mr. Sugar was aware of the diagnosis of his condition (J.A. 75); see also medical report of August 11, 1962, of Dr. Samuel J. N. Sugar, who was decedent's cousin as well as his doctor, identified on deposition of Dr. John R. Bowen as plaintiff's Exhibit No. 4 for identification (J.A. 53). But even more importantly, the record shows affirmatively exactly why Sugar selected the date he did, and insisted on it *despite the Company's suggestion (J.A. 87, 91) that he elect an earlier date.*

Plaintiff's own deposition demonstrates that she herself knows nothing about any basis for her complaint, see her deposition, pages 22-24, and *passim* (not printed). However, Samuel Sugar's son, Marvin L. Sugar, plainly does know the facts, since he was in the same office with his father for many years, including the period here relevant. Marvin Sugar stated in a letter to the Company on December 7, 1962, that

"Knowing Dad as you did, I think you will understand, as I'm sure Wayne² does, that his last challenge was to live to see his 60th birthday—which would have been November 11th. It was for this reason alone, I know, he picked this date—and *stuck* to it." (Deft's

¹ Plaintiff states here that "contrary to defendant's assertion in its motion for summary judgment * * * there is no evidence Mr. Sugar ever saw this memorandum (J.A. 68-69)". Brief for Appellant 6. This is incorrect. The memorandum of August 2, 1962 was delivered to Mr. Dorman, defendant's general agent, for forwarding to the Company, in support of Mr. Sugar's claim that he was totally disabled, for purposes of the Company's group health program for its agents (J.A. 83-84). As originally identified the first page of this exhibit is a hand-written memorandum in Mr. Sugar's handwriting (Deposition of Marvin L. Sugar, page 22). A photocopy of the first page of this exhibit is attached as Appendix A to this brief, and defendant moves to supplement the record to this extent.

² Refers to Wayne E. Dorman, General Agent for the Penn Mutual in Washington.

Exh. 5, deposition of Marvin L. Sugar, J.A. 32; the Company's reply, which was marked defendant's Exhibit 6 for identification, is at J.A. 34).

On these facts, the District Court granted defendant's motion for summary judgment.

SUMMARY OF ARGUMENT

Samuel J. Sugar, deceased, had been an outstanding agent of defendant Penn Mutual Life Insurance Company since 1931, and a member of Penn Mutual's Retirement Plan for Full-time Agency Field Representatives since January, 1941. He was one of the Company's leading experts on retirement plans, including plans of the type represented by the Company's plan for its agents. As of October 1, 1961, Samuel J. Sugar was suffering from cancer and was operated upon during that month for the removal of a parotid gland tumor. Because of his deteriorating health the Company suggested, and Sugar elected accordingly, that he retire prior to his normal retirement date, which would have been his 65th birthday, or November 11, 1967. In making this election, on October 1, 1962, he executed the designated form for that purpose, known as an "Exercise of Privileges." (J.A. 28) On the same date Sugar designated his sister, the plaintiff, Edith S. Markus, as his beneficiary under the plan, by executing an "Election of Annuity" form (J.A. 29). On both forms he fixed November 11, 1962, his 60th birthday, as his retirement date, despite the fact that the Company's general agent, Wayne E. Dorman, urged him to make it at once. There is no procedure under the plan whereby the Company, or anyone other than the agent, can designate a retirement date for an agent.

Under the terms of the retirement plan an agent's beneficiary would be entitled to the agent's entire interest in the plan (including the value of the Company's contribution, together with his own contributions), if the agent

should live until his designated retirement date. On the death of an agent prior to his designated retirement date the Company's obligation is limited to payment to his estate of the agent's own contributions to the fund with accrued interest; and no rights accrue to the agent's designated beneficiary.

Samuel J. Sugar died November 8, 1962, and hence was not living on his stated retirement date. I. Lewis Markus and Marvin L. Sugar are the executors of the Estate of Samuel J. Sugar, deceased. On December 17, 1962, Penn Mutual paid to the executors of the Estate of Samuel J. Sugar the sum of fourteen thousand, seventy-nine dollars and eighty-one cents (\$14,079.81) which represented Samuel J. Sugar's personal contributions to the Retirement Plan, with interest. (Although the executors were Marvin L. Sugar, decedent's son, and I. Lewis Markus, plaintiff's husband, they accepted this payment without protest or question). Such payment fulfilled all duty of the Company to the deceased Sugar.

ARGUMENT

I

APPELLEE HAD NO DUTY, AND NO POWER, TO DESIGNATE A RETIREMENT DATE FOR DECEDENT.

The retirement plan here involved is "The Penn Mutual Agents Retirement Plan and General Agents and Supervisors' Retirement Plan". The entire plan (as in effect during 1962) is in the original record, and the portions here material are printed in the Joint Appendix (J.A. 37 et seq.). Article VI provides in relevant part:

"Retirement

"3. *Early Retirement:* A member who has attained age 55 and completed 15 years of membership in the Plan may retire prior to Normal Retirement Date by filing a written election with the Company * * *."

The form whereby decedent elected early retirement is reproduced in the record (J.A. 28); as is the accompanying form for "Election of Annuity" (J.A. 29), whereby he designated his sister, plaintiff below and appellant here, as his beneficiary, and elected "Option 1", the terms of which are set out in the form (J.A. 29-30). There is no provision in the plan, and there is no way in or out of the plan, whereby the Penn Mutual could lawfully designate a date for an agent other than the date designated by him.

It will be noted, further, that the Company has paid Mr. Sugar's executors the amount of his contributions to the plan, with accrued interest, pursuant to the provisions of the plan. The Company would have been open to suit by the executors if it had, instead, paid plaintiff, in violation of the terms of the plan.

A. Appellant's contention that the Penn Mutual received a "profit" is erroneous

Appellant states at various places in her brief that the Penn Mutual received a "profit" as a result of the death of Samuel Sugar (e.g. Brief for Appellant 3, 10, 15). At page 15 appellant expands on this:

"Defendant had an obvious conflict of interest: it owed Mr. Sugar the duty of protecting him by seeing that he retired immediately, an act which would cost defendant \$16,000; its own interest was served when Mr. Sugar took a foolish risk by postponing retirement, a risk that resulted in a \$16,000 profit to defendant. The \$16,000 went directly to defendant, not into a fund for benefit of other retirees." (Emphasis added)

This is wholly incorrect. The Company maintains reserves which are actuarially determined to provide for payment of future benefits under the Agents' Retirement Plan. The reserves represent the present value of future benefits discounted for interest and based on the assump-

tion that the death rates among the members of the Plan will be in accordance with the mortality table used in the calculations.

The reserve comes from contributions made by the agents and by the Company, together with interest earned thereon. The members' contributions are determined by formula related to the Agent's earnings. The Company's contribution each year is the amount required to build up the necessary reserves, taking into account the reserves held at the end of the previous year, members' contributions, interest earned on the fund and benefits paid out. Thus, the Company's contribution is a balancing item and it may be more or less than the total of the members' contributions.

At the time of Samuel J. Sugar's death in November 1962, the portion of the Retirement Plan reserves which represented his future benefits was approximately \$30,000. The death benefit under the Plan was about \$14,000 so the reserve released on his death was about \$16,000. This amount did not go to the Company but simply remained in the Retirement Plan reserves. In fact, the Plan provides specifically that in no event shall any amount contributed under the Plan be used for or diverted to purposes other than for the exclusive benefit of members or their beneficiaries until all liabilities to members or their beneficiaries have been satisfied. Art. XVI, par. 1, (J.A. 44). Moreover, this provision is also required by the Internal Revenue Code (section 401(a)(2)), 26 U.S.C. 401(a)(2).

For all these reasons it is, we submit, perfectly clear that the Penn Mutual not only had no "duty" to depart from the express terms of its retirement plan, but could not legally have done so.

B. There is no authority in support of appellant's contentions

The leading case in respect to an employer's duty to advise an employee in regard to his rights under a retirement plan is *Gediman v. Anheuser Busch, Inc.*, 299 F. 2d 537 (C.A. 2, 1962), relied on by both parties below. The *Gediman* case may be considered as representing the frontier of the law in this area, see Davis, "Liability to Employees for Gratuitous Advice or Service," XVIII The Business Lawyer No. 4, p. 1063. (Am. Bar. Ass'n. 1963); and *Gediman* is entirely different from the instant case. *Gediman* relates to a duty to give an inquiring employee accurate information about the terms of the plan. Here it was the Company which initiated the effort to have Samuel Sugar select early retirement in his own interest, and it was the employee who steadfastly resolved not to retire prior to November 11, 1962. Moreover, this was not a situation of giving information to the employee, as in *Gediman*, since Mr. Sugar was himself an outstanding expert in the field, and knew more about it than Mr. Dorman (J.A. 89). And, in any event, no inaccurate information was given to him.

It is interesting to note, incidentally, that section 552 of the Restatement of Torts, on which the Second Circuit relies in *Gediman*, is being redrafted by the American Law Institute, and that the current "Tentative Draft No. 12" limits the potential liability to an employer who "supplies false information". Even the appellant does not suggest that the Company gave Samuel Sugar any "false" information.

While the clear absence of any sort of "duty" on the Company would seem to suffice to show that the court below correctly granted summary judgment, we turn briefly to some of the other arguments of appellant.

II

**THE REMEDY OF REFORMATION IS TO BE USED TO EXPRESS
THE REAL INTENTION OF THE PARTIES WHEN FRAUD
OR MISTAKE HAS BEEN COMMITTED.**

The remedy of reformation is not applicable to the instant case because the decedent's Election of Annuity does express the intent of the parties and, further, there is no evidence, or allegation of either fraud, mistake, or of incompetency of Samuel Sugar.

It is established that "... a court of equity nevertheless has power to reform a deed or other written instrument when, because of fraud or mistake, it does not express the true intent of the parties." *Hawkins et al. v. Frandkin et al.*, 85 U.S. App. D.C. 310, 178 F. 2d 705, at 708 (1949).

The RESTATEMENT OF CONTRACTS, section 504, describes reformation for mutual mistake as follows:

"Except as stated in §§ 506 and 509-511, where both parties have an identical intention as to the terms to be embodied in a proposed written conveyance, assignment, contract or discharge, and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third persons will not be unfairly affected thereby."

See also 5 WILLISTON, CONTRACTS, § 1549 (Rev. ed. 1937) at page 4343, where it is stated that:

"The province of reformation is to make a writing express the bargain which the parties desired to put in writing."

At no place in the complaint is there any allegation that Samuel J. Sugar signed his Election of Annuity and elected November 11, 1962 for his retirement date because of any mistake on his part or fraud on the part of the Penn Mutual; as has been seen the record is expressly to the con-

trary. Mr. Sugar's son, Marvin L. Sugar, clearly admitted in his letter to John M. Huebner, that Samuel Sugar selected his own retirement date as "... his last challenge was to live to see his 60th birthday which would have been November 11th. It was for this reason and this alone that he picked this date—and *stuck* to it." (J.A. 32)

III.

THE DOCTRINE OF ESTOPPEL IS NOT APPLICABLE.

As stated in 1 WILLISTON, CONTRACTS, § 139 (3rd ed. 1957) at page 601:

"Equitable Estoppel.

"It is generally held that a representation of fact made to a party who relies thereon with the right to so rely may not be denied by the party making the representation if such denial would result in injury or damage to the relying party."

In *Dickerson v. Colgrove*, 100 U.S. 518, 25 L. Ed. 618 at 619 (1880) Justice Swayne stated:

"The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

There is nothing in the record on the motion which shows defendant leading Samuel J. Sugar to do what he would otherwise not have done, nor is there any allegation of fraud or falsehood by the defendant. Instead, as has been seen, the record shows that contrary to advising Samuel Sugar to select the date of November 11, 1962, as his retirement date, the Penn Mutual urged him to select an earlier date. In further explanation of this effort by

the Company, the defendant's Answer to Plaintiff's Interrogatory No. 27 reads as follows:

"(a) to (f). Wilkins S. Thomson of the Company's Agency Department suggested to Wayne E. Dorman, the Company's General Agent in Washington, D. C., that Mr. Sugar be urged to consider early retirement in view of his condition. Mr. Dorman discussed the matter with Mr. Sugar several times in August and September, 1962. Mr. Sugar refused to retire before his 60th birthday which would have been on November 11, 1962, and elected that date."

There is thus no basis for an estoppel here to prohibit the defendant from denying that Samuel J. Sugar retired on October 1, 1962, when he didn't in fact retire on that date, and refused to do so.

CONCLUSION

The District Court correctly granted defendant's motion for summary judgment.

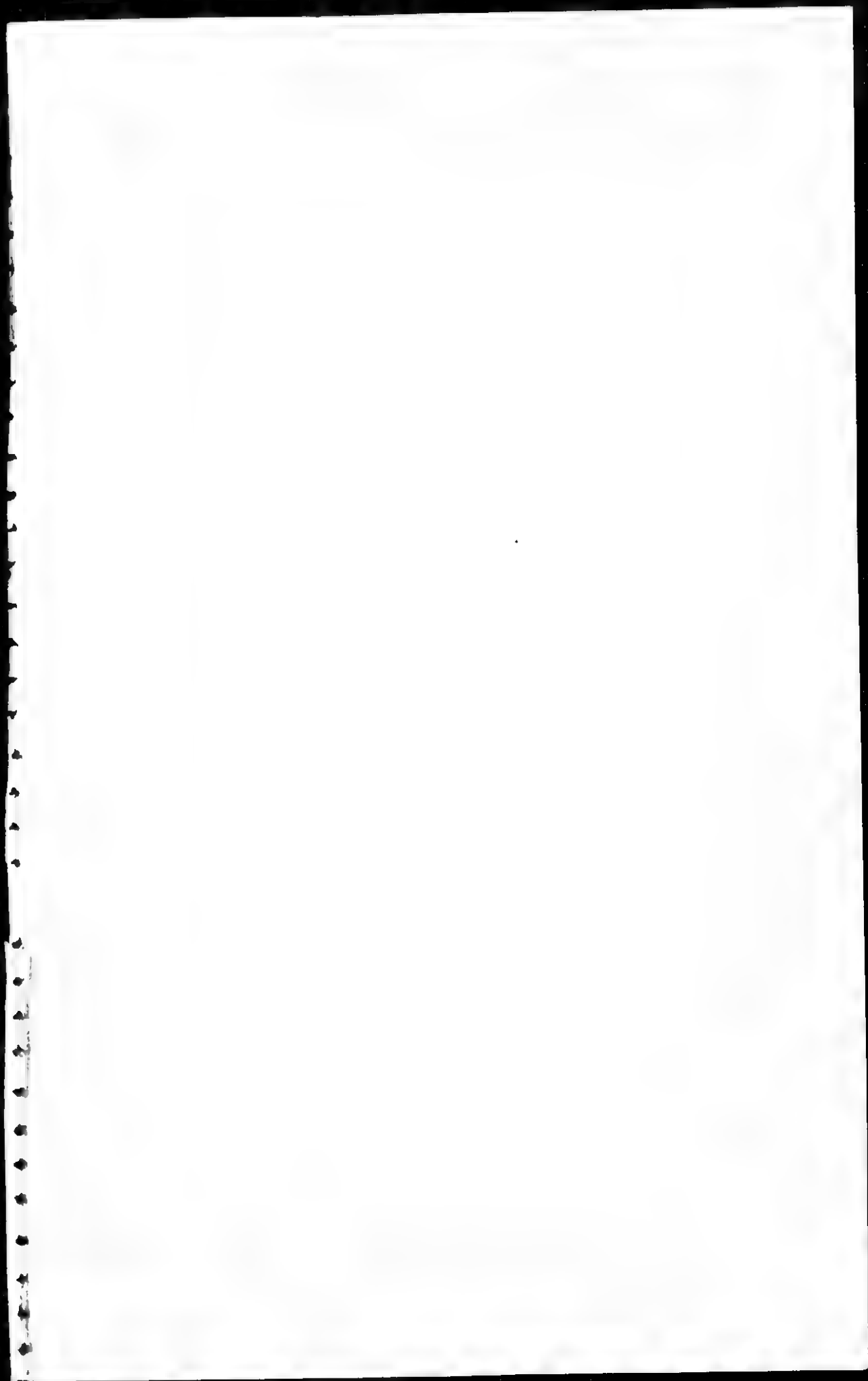
Respectfully submitted,

FREDERICK A. BALLARD
912 American Security
Building
Washington, D. C. 20005

JOHN L. ESTERHAI
Penn Mutual Life
Insurance Co.
Independence Square
Philadelphia, Pennsylvania

Attorneys for Appellee

September 12, 1966



August 2, 1962

MEMORANDUM

Re: Illness of Samuel J. Sugar
Policies 2631398 & 2638336
- - - - -
Group Insurance Claim #11-002466

Operated on for removal of Parotid Gland tumor about October 25, 1961. Gland, 7th cranial nerve, lymph glands, and neck mastoid muscle - plus other items removed. In hospital for about 2½ weeks, then at home for about 3½ weeks before visiting the office. Came into the office for a few hours daily thereafter until around March 1st when trouble developed in left arm and esophagus. Visited orthopedic doctor, physiotherapist doctor, throat doctor, surgeon who did the original operating in New York, and was referred to local cancer man, Dr. T. Crandall Alford. X-Ray pictures indicated tumor cells still present and X-Ray treatments were begun by a Dr. Ralph Caulk to the cervical spine for treatment to the arm that was carried in a sling for a few months. These lasted over one month and then X-Ray treatments began for stricture in the esophagus, after being in the hospital where a chest doctor attempted to get down in the throat but could not do so because of the angle of the left jaw. So, X-Ray treatments to the esophagus began. While these treatments were going on vision in the left eye became affected and Mr. Sugar began seeing double. The eye physician indicated something wrong with the 6th cranial nerve controlling the muscle of the left eye. Naturally, with the left arm and eye affected, Mr. Sugar cannot drive an automobile, and with the esophagus trouble cannot do much talking and cannot accept telephone calls. This has been true since March.

Mr. Sugar's routine is to go for an X-Ray treatment every morning at around 11:A.M., then go to his office where he looks at the mail, then has lunch, then takes a nap, then hangs around the office for another hour or two in order to keep himself from having too much idle time.

APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR
REHEARING EN BANC

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20247

EDITH S. MARKUS, *Appellant*

v.

PENN MUTUAL LIFE INSURANCE Co., *Appellee*

FREDERICK A. BALLARD
912 American Security Building
Washington, D. C. 20005

United States Court of Appeals

for the District of Columbia Circuit

JOHN L. ESTERHAI

The Penn Mutual Life Insurance Co.
Independence Square
Philadelphia, Pennsylvania 19105

FILED JUL 6 1967

Nathan J. Paulson
CLERK

*Attorneys for Penn Mutual Life
Insurance Company*

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20247

EDITH S. MARKUS, *Appellant*

v.

PENN MUTUAL LIFE INSURANCE Co., *Appellee*

**APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR
REHEARING EN BANC**

Appellee submits that a study of Judge Leventhal's interesting and conscientious dissenting opinion will make clear to the Court that there is here involved no question of material fact, if indeed there is any substantial question of fact at all. The majority opinion states (slip opinion, p. 4): "As we see it, the facts here are not in dispute."

Appellee not only had no duty but it had no power to designate a retirement date for the decedent other than the date designated by him and insisted upon by him, despite Mr. Dorman's suggestion that he fix an earlier date. Moreover, the Court will note that the Company has paid the decedent's executors the amount of his contributions to the plan, with accrued interest pursuant to

the provisions of the plan; and that the Company would have been open to suit by the executors if it had instead paid appellant in violation of the terms of the plan. The majority opinion also points out (slip opinion, p. 4): "There was no misrepresentation here; the company stood, literally, ready and willing to implement instant retirement."

There would surely be far-reaching consequences from a finding that an employer has a legal duty to determine when it would be to the advantage of an employee to exercise an early retirement option despite the employee's own refusal to do so after it has been called to his attention, or to induce the employee to exercise the option even though this may involve withholding of facts known to the employer and possibly not appreciated by the employee. Such a holding would be particularly disruptive when it would permit a jury to speculate as to whether the employer tried hard enough to persuade the employee to do something he did not want to do.

Appellee submits that this case was a proper case for summary judgment and that the court below and the majority of the hearing panel have correctly come to that conclusion.

Respectfully submitted,

FREDERICK A. BALLARD
912 American Security Building
Washington, D. C. 20005

JOHN L. ESTERHAI
Penn Mutual Life Insurance Co.
Independence Square
Philadelphia, Pennsylvania 19105

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Answer to Appellant's Petition for Rehearing En Banc was mailed this 6th day of July, 1967, to Leon M. Shinberg, Esquire, Washington Building, Washington, D. C. 20005, attorney for third-party defendants, and to Stanley Klavan, Esquire, 839 Seventeenth Street, N.W., Washington, D. C. 20006, attorney for Appellant.

FREDERICK A. BALLARD

APPELLANT'S PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 20247

EDITH S. MARKUS,
Appellant,

v.

PENN MUTUAL LIFE INSURANCE CO.,
Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 26 1967

Nathan J. Paulson
CLERK

STANLEY KLAVAN

J. H. KRUG

839 Seventeenth Street, N.W.,
Washington, D.C. 20006

Attorneys for Appellant

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 20247

EDITH S. MARKUS,

Appellant,

v.

PENN MUTUAL LIFE INSURANCE CO.,

Appellee.

APPELLANT'S PETITION FOR REHEARING EN BANC

Appellant respectfully petitions the Court for rehearing en banc.

1. Grounds for this petition are cogently set forth in Judge Leventhal's dissenting opinion. It would be presumptuous and superfluous for us to restate that opinion.

2. Only the following comments are offered:

(a) The majority opinion states (Slip opinion, p. 2): "The company officers knew . . . that

Mr. Sugar's illness was in a terminal phase, but the record indicates that he did not know it" Thus the Company, which was in a fiduciary position, knew or had reason to know that in selecting his retirement date Mr. Sugar acted on a false view of his life expectancy. Despite its superior knowledge, the Company entered into a transaction with its cestui que trust whereby the cestui had everything to lose and nothing to gain, and the fiduciary profited by \$16,000.

(b) The engine by which the majority opinion relieves the fiduciary is an unsupported assertion, i.e., that the only means by which the Company could have persuaded Mr. Sugar to expedite his retirement was to tell him that death was imminent. But, as Judge Leventhal points out, a jury could find that the Company, without revealing to Mr. Sugar that death was near, could have induced him to make retirement effective in October. The majority opinion suggests that the family seeks to shift to the Company the disagreeable obligation of informing Mr. Sugar that he was dying (p. 3). In fact, however, the decision shifts to the family the legal duties which the Company owed Mr. Sugar, who had been its agent for 31 years and a member of its retirement plan for 21 years.

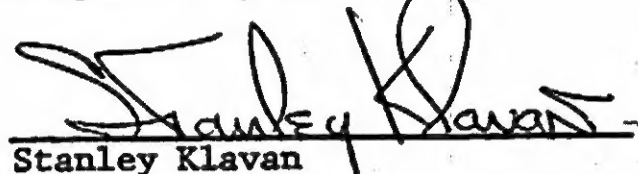
(c) In affirming summary judgment, the majority views the evidence in the light most favorable to the Company.

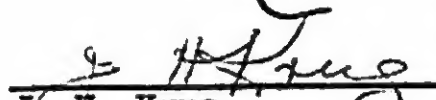
This conflicts with the basic rules on summary judgment, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). It operates to deprive appellant of her right to jury trial on a claim which presents material issues of fact, as abundantly shown in Judge Leventhal's opinion.

(d) Retirement plans of the sort here involved are in widespread use. Under the majority opinion companies with such plans are relieved of anything more than perfunctory obligations.

We respectfully submit that the decision is erroneous and, if allowed to stand, will have haunting consequences.

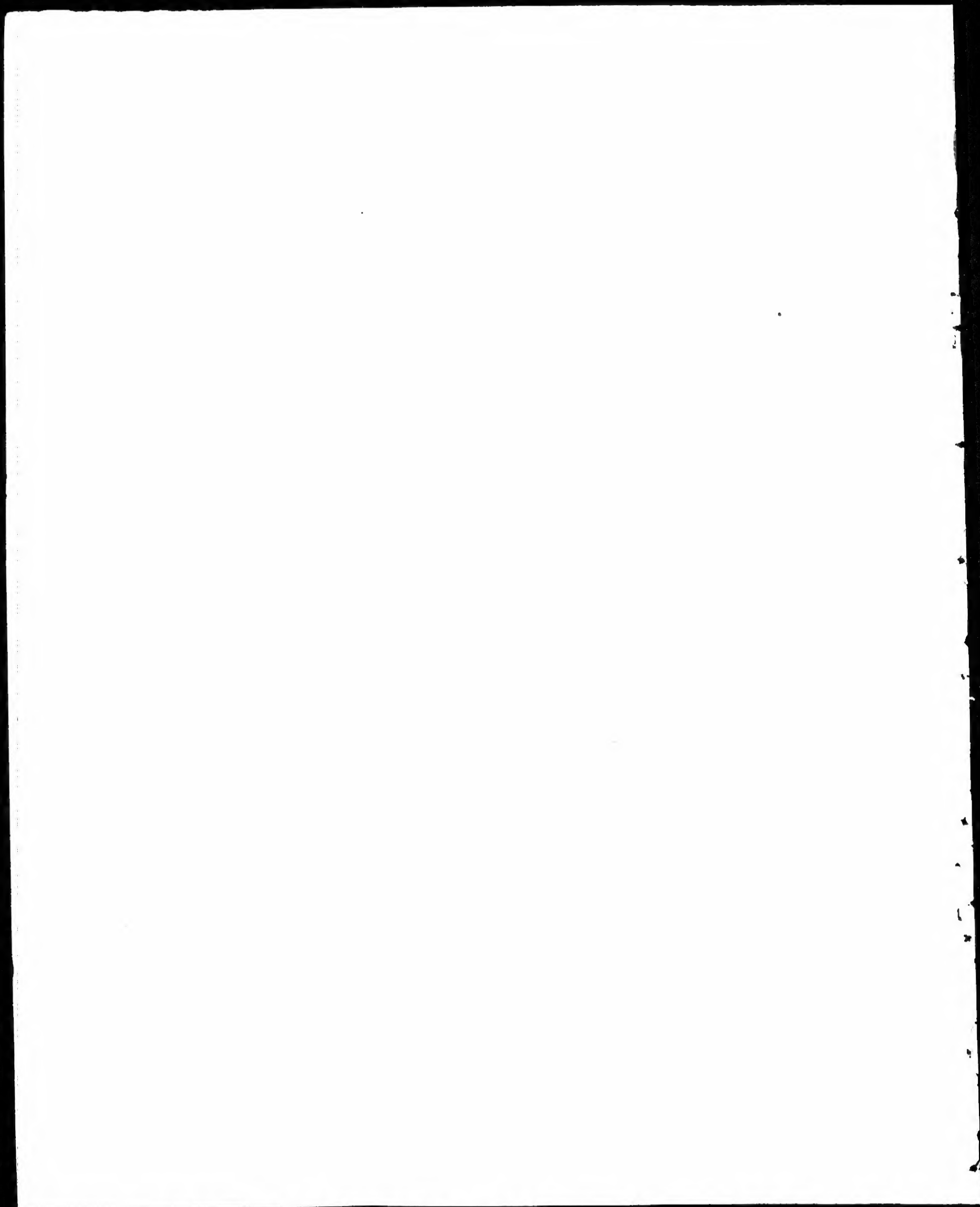
Respectfully submitted,


Stanley Klavan

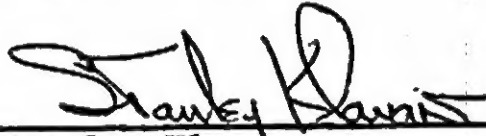

J. H. Krug
839 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I, Stanley Klavan, member of the Bar of this Court and counsel for Appellant, do hereby certify that

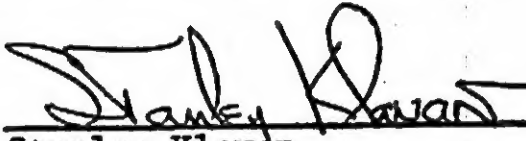


Appellant's Petition for Rehearing En Banc is presented in good faith and not for the purpose of delay.


Stanley Klavan
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Petition for Rehearing En Banc was mailed, postage prepaid, this 26th day of June, 1967, to Frederick A. Ballard, Esquire, 912 American Security Building, Washington, D.C. 20005, attorney for appellee, and to Leon M. Shinberg, Esquire, Washington Building, Washington, D.C. 20005, attorney for third-party defendants.


Stanley Klavan